Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1558

THOMAS H. THEODOSOPOULOS,
Petitioner

v.

STATE OF NEW HAMPSHIRE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

Eugene M. Van Loan, III, Esquire
95 Market Street
Manchester, New Hampshire 03101
(603) 669-4140
Counsel for the Petitioner

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MISCELLANEOUS

N.H. Superior Court Rule 96. 15

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW HAMPSHIRE

The Petitioner, Thomas H. Theodosopoulos, through counsel, respectfully prays that a Writ of Certiorari issue to review the decision and order of the Supreme Court of New Hampshire, issued August 17, 1979 and modified January 4, 1980.

OPINIONS BELOW

A copy of the opinion of the Supreme Court of New Hampshire is attached hereto as Appendix A. It is a published opinion which has not been given an official

citation as of the date of the printing of the Petition herein. The Petitioner [hereinafter referred to as defendant] is informed however, that the opinion will be printed in Volume 119 of the New Hampshire Supreme Court Reports. The decision was originally rendered by the New Hampshire Supreme Court on August 17, 1979 and distributed September 14, 1979. The defendant filed a timely motion for rehearing on September 24, 1979. See Appendix C. On January 24, 1980, the Supreme Court of New Hampshire denied the defendant's motion for rehearing and modified its opinion of August 17, 1979. Appendix A reflects both the original opinion of the Supreme Court of New Hampshire of August 17, 1979 and its modifications (in manuscript) of January 4, 1980. As indicated by the order of the Court and the cover letter to counsel from the Clerk of Court, the New Hampshire Supreme Court order and modification of January 4, 1980 were issued and distributed on January 7, 1980.

A copy of the opinion of the trial Court, the Hillsborough County Superior Court, unpublished, is attached hereto as Appendix B.

JURISDICTION

The jurisdiction of this Court to review the decree of the New Hampshire Supreme Court is provided by 28 U.S.C. §1257(3). The decree sought to be reviewed is the opinion and order of the New Hampshire Supreme Court of August 17, 1979 (distributed September 14, 1979), as modified by the Court on January 4, 1980 and issued on January 7, 1980.

QUESTIONS PRESENTED

1. Did the New Hampshire Supreme Court erroneously determine, upon the facts of this case, that sufficient objective probable cause

and exigent circumstances existed to justify the warrantless entry into are search of the defendant's apartment?

2. Does a warrantless nighttime entry into and search of a citizen's home require a higher degree of probable cause than that which will support the issuance of a warrant?

3. Must evidence obtained as a result of a warrantless nighttime entry into and search of a citizen's home be excluded in a criminal prosecution where the police officers executing the entry and search did not subjectively believe that evidence would probably be found or that an emergency existed?

CONSTITUTIONAL PROVISIONS

At issue in this case is the Fourth Amendment to the Constitution of the United States, as made applicable to the States by the Fourteenth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

At approximately 12:50 a.m., December 31, 1977, a single gunshot was fired in the Manchester Police Station, Manchester New Hampshire, simultaneously injuring Manchester Police Captain Xiggoros and Mrs. Dorothy Perreault, a civilian. At the time, Mrs. Perreault was standing at the desk in the lobby of the Police Station talking to Captain Xiggoros about a complaint she was making against her son, Bruce Perreault. Several hours before the shooting in question, Mrs. Perreault had complained that her son had pointed a gun at her. As a result, she had been brought into the Police Station "for safety".

Soon after the shot was fired, Captain Xiggoros stated, "get that little so and so. He just shot me." Because of the nature of Mrs. Perreault's complaint and the statement of Captain Xiggoros, the Manchester Police Department assumed that the shot had been fired by Mrs. Perreault's son, Bruce, and that the intended victim had been Mrs. Perreault.

As a result of the shooting, the Manchester Police Department mobilized and called in a number of its off-duty officers.

The initial assumption of the police officers was that the shot which had injured Captain Xiggoros and Mrs. Perreault had been fired from inside the Police Station itself and that the assailant was still in the Station. Consequently, the

lights in the Police Station were turned out, the Station was cordoned off and a search was conducted of the inside of the Station. After an unsuccessful search of the interior of the Station revealed that the assailant was not present, the injured Captain Xiggoros and Mrs. Perreault were removed to a hospital by ambulance.

One group of Officers was then dispatched throughout the City in an attempt to locate the assumed assailant, Bruce Perreault, wherever he might be found. At the same time, an attempt was made to reconstruct the circumstances of the shooting. When Captain LeBoeuf had entered the Police Station soon after his arrival, he had come through the front door of the Station on Chestnut Street and noticed an apparent bullet hole in the front window. Having determined that the assailant was not inside the Station, the police then deduced that the hole in the window had been made by a bullet fired from the outside of the Station.

At this point, Sargent Durette was instructed to deploy his "Special Reaction Team" to conduct a search for the assailant (still assumed to be Bruce Perreault) immediately outside the Station. Sargent Durette testified that a Special Reaction Team is, "a team of men especially trained to respond to hostage, sniper or other situations". On this particular evening, the full Team consisted of eighteen officers, including Sargent Durette.

By the time that it was determined that the shot had been fired from outside the Station and Sargent Durette and his Team had left the Station, it was between 1:45 a.m. and 1:50 a.m. or approximately one hour after the shooting. As stated above, another group of police officers had already commenced their effort specifically to locate Bruce Perreault elsewhere in the City of Manchester.

Initially, Sargent Durette took his Team to an abandoned church building located at the intersection of Chestnut and Merrimack Streets. This building is located across Chestnut Street from the Police Station, to the left front of the Station. A search of the church building proved to be negative. At that point, Sargent Durette positioned his men around the church building under the supervision of Sargent Tanguay and returned to the Station.

Back at the Station, Sargent Durette conferred with Captain Murphy. An attempt was then made to determine the approximate trajectory of the bullet which had struck Captain Xiggoros and Mrs. Perreault. Lining up the victims' location at the time of the shot and the bullet hole in the window, Sargent Durette concluded that the shot apparently had been fired from somewhere to the right front of the Police Station. This was in the direction of a series of buildings extending down Manchester Street perpendicularly from Chestnut Street away from the front of the Station.

For the first time during the evening, the investigation now focused upon the buildings located on Manchester Street (one of which contained the defendant's apartment). This involved a row of buildings fronted by Manchester Street and backed by an alley. The buildings variously contained shops and apartments and consisted variously of two, three or four storeys. By the time that the Special Reaction Team redeployed and started to search the buildings on Manchester Street, it was between 2:00 a.m. and 2:05 a.m., or approximately an hour and fifteen minutes after the shooting.

Sargent Durette testified that he concluded only that the shot had been fired from "somewhere on the Manchester Street side". He agreed that, "so far as where is concerned, (I) really didn't know". He also agreed that during the approximate hour and fifteen minutes since the initial shot, no other shot had been fired or reported to have been fired. Finally, Sargent Durette stated that during this period, the police "hadn't received any reports from any witness or other person concerning any information about the shooting."

Despite the fact that the Manchester Street buildings had gone unobserved and unattended since the time of the shooting, Sargent Durette testified that:

> Q. It was at this point, I take it, the decision was made you would move down Manchester Street and search <u>every one of these buildings</u>?

> A. <u>That's right</u>.

(Emphasis supplied) Indeed, Sargent Durette stated that it was "our policy and our SOP" that when a building search was conducted, "you didn't leave a building until we searched it thoroughly".

Sargent Durette also testified that all of the members of the Special Reaction Team were aware of the fact that Captain Xiggoros, "one of [our] own men" had been a victim of the shooting. He agreed that this circumstance gave the men "a little extra incentive to go out and do the job."

In order to effectuate the sweep search of all of the buildings along Manchester Street, the Special Reaction Team deployed down Manchester Street in front of the buildings, through the alley to the rear of the buildings and up on the rooftops of the buildings. The first building on Manchester Street that was searched was a "Sub Shop" on the corner of Manchester Street and Chestnut Street. The door was locked, but the police were able to search the building by looking through unobstructed glass windows. The next was a vacant photo shop, which was also empty.

At this point, the Special Reaction Team came to a four storey apartment building containing several entryways. The police entered the first doorway, labeled 83 Manchester Street, which was closed but unlocked. The door, which was the

only entry or exit to the ground floor of the building, opened into a hallway. Members of the Special Reaction Team searched the cellar, which was empty. Sargent Durette then posted one man on the ground floor in the hallway and the balance of his Team (seven men) climbed the stairs to the second floor. In addition, there were other members of the Team posted in the alley to the rear of the building.

Upon reaching the second floor, the officers knocked on a door to the single apartment on that floor. Mrs. Irene Berlinguette, the tenant, answered the door. She was advised by Sargent Durette that there had been a shooting in the area and that the police desired to search her apartment. Upon receiving Mrs. Berlinguette's consent, a search of her apartment was conducted, with negative results.

The search of Mrs. Berlinguette's apartment occurred at approximately 2:15 a.m., about an hour and one-half after the shooting. Mrs. Berlinguette testified at the hearing that the police asked her, "did you hear any noises or gunshots?" and that she responded negatively.

After searching Mrs. Berlinguette's apartment, the police officers proceeded to the third floor of the apartment building, leaving another member of the Team on the second floor. Located on the third floor above Mrs. Berlinguette's apartment was another single apartment. Sargent Durette and his officers pounded on the doors to the third floor apart-

ment with their fists and night sticks, receiving no response whatsoever. Likewise, no noise was heard from inside the apartment. The Officers did observe some light in the apartment from beneath one of the doors.

Sargent Durette then hollered down to Mrs. Berlinguette on the second floor asking her whether or not she had heard any noise upstairs in the apartment above her. She responded that she had not. Sargent Durette also inquired as to the identity of the occupant of the third floor apartment and Mrs. Berlinguette advised him that the tenant was the defendant, Thomas Theodosopoulos. Sargent Durette then asked Mrs. Berlinguette if she knew whether or not Thomas Theodosopoulos was at home. At this point, the testimony given at the hearing is somewhat at odds. Sargent Durette testified variously that Mrs. Berlinguette stated:

1. "If his truck is outside, he must be home."
2. "If his truck is outside, he is home most likely."
3. "If his truck is out there he possibly is home."

In any case, Sargent Durette continued pounding and knocking on the doors to the third floor apartment, still without response. He then sent three men up to the fourth floor apartment, which was searched without event. Simultaneously, other members

of the Special Reaction Team climbed the fire escape on the backside of the building to check the roof.

At that point, the entire Manchester Street sweep search came to a halt. As Sargent Durette testified, "I was determined I wasn't going to leave the building until that building was searched completely." In order to gain access to the locked apartment, Sargent Durette radioed over to the Station to see if the identity of the landlord could be determined and keys to the apartment could be obtained. Somehow the Station personnel determined the identity of the landlord, who lived elsewhere in Manchester, and dispatched an officer to retrieve the keys.

Sargent Durette and his Team waited in excess of one-half hour for the keys to arrive. During this period of time, police officers were stationed to the front of the building on Manchester Street, to the rear of the building in the alley, in the first and second floor hallways and outside the defendant's apartment in the third floor hallway. The lights in the Station had also been turned back on. No additional shots were fired; no noise was heard from inside the defendant's apartment; and the specific search for Bruce Perreault continued.

At some point while Sargent Durette was awaiting the keys to the apartment, Sargent Tanguay radioed from outside and inquired whether or not the Special Reaction Team should continue down

Manchester Street searching the other apartments and buildings. Sargent Durette advised that the sweep would be halted until he had completed a search of the defendant's apartment because it was "our policy and our SOP in building searches".

At approximately 3:00 a.m., over two hours after the shooting, an officer arrived at the building on Manchester Street with a set of keys. Apparently, however, the wrong keys had been obtained because they did not fit any of the doors to the defendant's apartment. After making an abortive attempt to open the doors with the keys, Sargent Durette and his men recommenced banging on the doors with flashlights and night sticks. Again, "no response" was received.

As testified to by Sargent Durette, "then I made the decision to go in". Forceable entry was made by kicking in one of the doors to the apartment. At the time of the entry, no arrest or search warrant had been procured.

The door that was kicked in opened into a living room. A search was made of the living room and an adjoining room, both of which faced Manchester Street. No person was found. The officers then proceeded through an interior hallway into the kitchen. When the officers entered the kitchen, they could see the defendant lying on his bed in a bedroom off the kitchen. The officers immediately "fanned out" to see if there was any other person in the apartment. The only person found was the defendant.

The defendant appeared to be passed out. Sargent Durette attempted to wake the defendant by shaking him, but received no response. In the defendant's bedroom, Officer Durette saw a styrofoam box of 19 empty rifle shells lying on top of a dresser. He also found a rifle scope lying on the dresser, but the scope was "full of dust" and obviously had not been used recently.

The defendant had still not been roused from his condition. Sargent Durette therefore left two men to guard him and "proceeded to check the rest of the apartment." In a room off the kitchen, there was a closet on the back wall with a locked padlock. Sargent Durette grabbed the padlock to see if it would open, but it would not. After searching the "closet room", Sargent Durette continued to check the apartment. In the bathroom, he found a broken pane of glass in the rear window, which faced the back alley. Sargent Durette "hunched down" and looked through the hole in the glass; he was able to see the Police Station and the apparent bullet hole in the window.

After the above-described search of the defendant's entire apartment and the discovery of the evidence indicated, Sargent Durette called the Station and requested the presence of Deputy LeBoeuf. When Deputy LeBoeuf arrived, he was shown all of the various items of evidence

which had been uncovered by Sargent Durette in his search of the apartment. At that point, Deputy LeBoeuf instructed the officers to arouse the defendant and to "take him into custody".

Coincidently, Bruce Perreault had been apprehended at approximately the same time in another section of Manchester. He also was brought to the Station.

At the Station, Sargent Durette briefed Lieutenant Crotty concerning the break-in and search of the defendant's apartment. Lieutenant Crotty then prepared an affidavit for a search warrant based upon the information provided by Sargent Durette. At approximately 6:00 a.m., Lieutenant Crotty took the affidavit to Judge Armand Capistran at his home and a search warrant was issued. The testimony indicated that Judge Capistran, who lives in Manchester, had been at home and available all evening, including when the defendant's apartment was broken into.

The purpose of the issuance of the search warrant was to conduct a search of the padlocked closet in the defendant's apartment. The second search commenced at 6:24 a.m. Now armed with the warrant, the officers forced open the lock on the closet. Inside the closet, they found a .350 Magnum rifle in a leather case, a 16 gauge shotgun, a pellet rifle and a box containing twelve live rounds of .350 ammunition.

At the January Term, 1978 of the Hillsborough County Superior Court, the Defendant was indicted by the Grand Jury on two counts of "attempted manslaughter". The indictments alleged that on December 31, 1977, the Defendant did recklessly in the nighttime fire a loaded rifle through a plate glass window to the Manchester Police Station, Manchester, New Hampshire, striking Manchester Police Captain Evangelos P. Xiggoros and Dorothy Perreault, causing them both bodily injury. The Defendant was arraigned and entered a plea of not guilty to each charge.

On February 17, 1978, the Defendant filed a motion to suppress all physical evidence seized from the Defendant or his apartment at 83 Manchester Street, Manchester, New Hampshire pursuant to New Hampshire Superior Court Rule 96.* The Defendant alleged in his Motion to Suppress that on December 31, 1977, Officers of the Manchester Police Department illegally broke into and entered his apartment at 83 Manchester Street without probable cause and without a warrant. The Defendant further alleged that a second

*Superior Court Rule 96 provided in pertinent part: "Whenever a motion to suppress evidence is filed before trial in any criminal case, the Court will determine, in its discretion, whether to hear the motion in advance of trial or at trial when the evidence is offered. If a hearing is held in advance of trial, neither the prosecution nor the defendant shall be entitled to a further hearing by the Court on the same issue at the trial. If the evidence is found to be admissible in advance of trial, it will be admitted at the trial without further hearing as to its admissibility.

entry into and search of his apartment, pursuant to a subsequent warrant, was a product of the prior unlawful entry into and search of his apartment. The defendant moved to suppress all evidence seized from his apartment on the grounds that it had been obtained in violation of his rights under the Constitution of the United States.

The Hillsborough Superior Court (Flynn, J.) agreed to hear the Motion to Suppress in advance of trial. A hearing was held before the Court on April 6, 1978. On April 25, 1978, the Court issued an opinion and order denying the Defendant's Motion to Suppress. See Appendix B. The Defendant duly excepted to the Court's ruling on April 26, 1978.

On May 2, 1978, the Defendant filed a Motion for Interlocutory Appeal to the Supreme Court alleging, inter alia, that the granting of the Defendant's Motion to Suppress Evidence would be dispositive of the State's case against the Defendant. The Trial Court (Flynn, J.) granted the Defendant's Motion for Interlocutory Appeal and reserved and transferred to the New Hampshire Supreme Court all questions of law raised by the Motion to Suppress and the Defendant's exception to the denial thereof.

The New Hampshire Supreme Court issued an opinion and order affirming the denial of the Defendant's Motion to Suppress on August 17, 1979 (distributed on September 14, 1979). On September 24, 1979, the Defendant filed a motion in the New Hampshire Supreme Court for rehearing. See Appendix C. In his Motion for Rehearing,

the Defendant alleged that, (1) the Court had erroneously determined that subjective probable cause was not required to justify a warrantless entry and search, (2) that the Court had erroneously determined that a subjective belief in the existence of exigent circumstances was not required to justify a warrantless entry and search, and (3) the Court had erroneously applied the same standard of probable cause for warrantless entries and searches as was pertinent to entries and searches made pursuant to a warrant. On January 4, 1980, (distributed on January 7, 1980) the New Hampshire Supreme Court denied the Defendant's Motion for Rehearing and modified its prior opinion of August 17, 1979. See Appendix A.

ARGUMENT

I. The New Hampshire Supreme Court Erroneously Determined That Sufficient Probable Cause and Exigent Circumstances, In An Objective Sense, Existed To Justify The Warrantless Entry Into And Search Of The Defendant's Apartment.

The general, exploratory search was precisely the type of official misconduct that lay at the heart of the Fourth Amendment to the Constitution of the United States. The historical milieu of the Amendment was aptly described by the Court in Boyd v. United States, 116 U.S. 616, 625, 29 L.Ed. 746, 749 (1886):

> In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms "unreasonable searches and seizures",

> it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the Colonies, of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in the English law book" since they had placed "the liberty of every man in the hands of every petty officer." This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugerated the resistance of the Colonies to the oppressions of the mother country.

To the extent that the Fourth Amendment condemns generalized, exploratory warrants, so much the more does it condemn exploratory searches of the type involved in this case conducted without a warrant. Indeed, the Court has held that warrantless searches are per se unreasonable, subject only to certain specific and carefully circumscribed exceptions. E.g., Coolidge v. New Hampshire, 403 U.S. 443, 454-455, 29 L.Ed.2d 564, 576 (1971):

> The most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval of judge or magistrate, are per se unreasonable under the Fourth

> Amendment--subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn" and there must be a "showing by those who seek exemption . . .that the exigencies of the situation made that course imperative." "The burden is on those seeking the exemption to show the need for it."

This case involves the intrusion into a private dwelling, which is "ordinarily afforded the most stringent Fourth Amendment protection". United States v. Martinez-Fuerte, 428 U.S. 543, 29 L.Ed.2d 1116, 1130 (1976); Dorman v. United States, 435 F.2d 385, 389 (U.S. App. DC, 1970). Although the Fourth Amendment "protects people, not places", the home is the place that people have the most legitimate expectation of the privacy which the Amendment was meant to secure. See generally, United States v. Chadwick, 433 US 1, 53 L.Ed.2d 538 (1977); Katz v. United States, 389 US 347, 19 L.ed.2d 576 (1967). Consequently, the magnitude and urgency of the circumstances which purport to justify a warrantless entry into a private home must be significantly greater than those which would authorize a similar invasion of personal rights in a public place. See generally, G.M. Leasing v. United States, 429 U.S. 338, 50 L.Ed.2d 530 (1977); United States v. Biswell, 406 U.S. 311, 32 L.Ed.2d 87 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72, 25 L.Ed.2d 60 (1970); See v. City of Seattle, 387 U.S. 541, 18 L.Ed.2d 943 (1947).

In light of the overriding Constitutional preference for prior approval by "neutral and detached magistrates", the law is that warrantless criminal searches and seizures may only be conducted with probable cause and in "exigent circumstances". E.g., G.M. Leasing v. United States, 429 U.S. 338, 50 L.Ed.2d 530 (1977); Coolidge v. New Hampshire, supra; McDonald v. United States, 335 U.S. 451, 93 L.Ed. 153 (1948). Several categories of "exigent circumstances" have been articulated and deliniated by the courts in their explication of the limits of permissible warrantless searches and seizures. Warden v. Hayden, 387 U.S. 294, 18 L.Ed.2d 782 (1967) (hot pursuit); Ker v. California, 374 U.S.23, 10 L.Ed.2d 726 (1963) (imminent destruction of evidence); Carroll v. United States, 267 U.S. 132, 69 L.Ed.543 (1925) (search of a moveable vehicle on the highway); see Schimel v. California, 395 U.S. 752, 23 L.Ed.2d 685 (1969) (search incident to a lawful arrest); Marron v. United States, 275 U.S. 192, 72 L.Ed. 231 (1927) (plain view); Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889 (1968) (stop and frisk). All of the "exigent circumstance" types of cases, however, have in common the fundamental notion that, in the absence of consent or otherwise lawful presence upon the premises, warrantless searches and seizures are unconstitutional unless there exists some emergency which mandates immediate action and prevents law enforcement officials from reasonably obtaining a warrant. See generally, Coolidge v. New Hampshire, supra.

Probable cause to seize (or arrest) a person requires information justifying a reasonable belief that a crime has been committed and that the particular person sought to be seized has committed the crime.

By comparison, probable cause for a search of places and for the seizure of things requires information justifying a reasonable belief that specific things consisting of evidence or instrumentalities of a crime are located on the property to which entry is sought. Zurcher v. The Stanford Daily, 436 U.S. 537, 56 L.Ed.2d 525 (1978).

Regardless of the standard to be applied, probable cause did not exist in this case for either an arrest of the defendant or a search of the defendant's apartment. The only element of probable cause which did exist--and quite clearly so--was that a crime had been committed. Probable cause, however, to believe that the defendant had committed the crime, or that the perpetrator (regardless of identity) was present in the defendant's apartment, or that evidence or instrumentalities of the crime were present in the defendant's apartment, was totally lacking.

The fact that for the first hour or more after the shooting, the Manchester Police believed that the shot had been fired from within the Station or from the left front of the Station resulted in the entire area to the right front of the Station, in which the defendant's apartment was located, being left unobserved and unattended. Consequently, any assailant who had fired at the Station from that direction had ample opportunity to flee from the area before the police focused their attention in that direction. This is particularly true since the initial focus of the police reaction and attention for the bulk of the first hour after the shooting was towards the inside of the Station. The "probability" was that if the assailant had fired from the Manchester

Street row of buildings, he had long since fled before Sargent Durette and his Special Reaction Team commenced their search of those buildings at approximately 2:00 a.m.

Assuming arguendo that the police "suspected" that the assailant might still be in the Manchester Street area, they had no probable cause to believe that the assailant was located in the defendant's apartment. Sargent Durette clearly testified that his makeshift attempt to determine the origin of the shot merely drew him in general to the buildings along Manchester Street. Sargent Durette never drew any conclusion that the shot had been fired from any particular building, from any particular store or apartment within a building, or even from within any building as opposed to a rooftop thereof.

Most significantly, the defendant's apartment was located in only the third building searched on Manchester Street. The police had clearly not searched the remaining available sites on Manchester Street before they came to the defendant's apartment. Indeed, the entire search came to a halt when the police arrived at the defendant's apartment and were stymied by the defendant's locked doors.

This case is quite unlike the case of United States v. Scott, 520 F.2d 697 (CA 9, 1975) (2-1 decision), cert. den., 423 U.S. 1056 (1976) in which a so-called "hot pursuit" search was sustained. In that case, the police had evidence that four black males had robbed a bank and had absconded in a car of a particular description and license number. Further information was received that the car was seen approaching

and later was found at an apartment complex and that four black males had been viewed leaving the car and entering the apartment courtyard. The car engine was found to be still warm, indicating that it had recently been driven. A search was then conducted of the entire apartment complex and was eventually narrowed down to one apartment. Police officers knocked loudly on the door, with no response. However, when the officers indicated their intention to enter the apartment, they heard noises inside. At that point, the officers entered the apartment without a warrant and found the alleged culprits.

In that case, the court specifically found that the police officers had probable cause to believe that the fugitives had entered the apartment complex and that, in particular, they were present in the last apartment. Having found that the police were in hot pursuit of the assailants and that the suspects "might well have escaped or concealed evidence", the Court found the warrantless entry of the defendants' apartment to be constitutional.

In the case at bar, however, there are no analogous facts which directed the police officers to this defendant's apartment. The defendant's apartment was encountered merely in the course of a methodical sweep search of every store and apartment in a series of possibly suspect buildings. No information whatsoever had been received by the police from any witness or other source that implicated either the defendant himself or

the defendant's apartment as a likely source for the gunshot. Indeed, Sargent Durette made it apparent in his testimony that such information was irrelevant to him, because he had determined from the very beginning that he would "move down Manchester Street and search every one of these buildings".

The discomfort of the New Hampshire Supréme Court with the lack of focus upon the defendant's apartment is apparent from the record below. In its original opinion of August 17, 1979, the Court stated that,

> By the time [the police] reached the defendant's apartment, they had searched a significant portion of the buildings that had windows facing the police station and had secured the buildings closer to the police station than the defendant's.

Page 7, Appendix A. As the defendant pointed out to the Court in his motion for rehearing, however, the defendant's apartment was located in only the third building searched and the State had offered no evidence as to the number of buildings or apartments involved. Page 3, Appendix C.

Undaunted, the New Hampshire Supreme Court simply denied the Defendant's Motion for Rehearing and modified its opinion to read as follows:

> By the time [the police] reached the defendant's apartment, they had searched a significant number

of these buildings and had secured those buildings which were closer to the police station than the defendant's.

Page 7, Appendix A. The Court's exercise in semantics notwithstanding, there is still no evidence to suggest that the search had narrowed down to the defendant's apartment.

It is important to note that at the time that the police officers arrived at the defendant's apartment, they did have a suspect in mind. The individual believed to have done the shooting was Bruce Perreault, the son of the apparently intended victim, Mrs. Perreault. Indeed, other members of the police force were combing other parts of the City for Bruce Perreault. When Sargent Durette and his Team were unable to gain entrance to the defendant's apartment, they inquired and were informed that the apartment belonged to Thomas Theodosopoulos, not Bruce Perreault. Since the apartment was locked and belonged to someone other than Bruce Perreault, there was essentially nothing to connect this defendant or his apartment to the crime under investigation. United States v. Lindsay, 506 F.2d 166, 171 (US App. DC, 1974); see Ybarra v. Illinois, 48 U.S.L.W. 4023 (November 29, 1979).

Nothing that the police officers learned outside the defendant's doorway indicated the presence of the defendant or any other person inside the apartment. Although a light could be detected under the door coming from one of the rooms on Manchester Street,that did not necessarily indicate

anyone's presence. The equivocal information which the officers received from the downstairs neighbor as to whether the defendant might be at home was irrelevant; the police were not looking for the defendant. Constant and repeated knocking and pounding upon the doors yielded absolutely no response from inside. Despite the fact that the police officers remained outside the defendant's apartment for approximately forty-five minutes, no noises or "muffled sounds" were detected from inside.

As stated by the Sixth Circuit Court of Appeals in a similar case, any suspicion that someone was present "was rebutted to some extent by the fact that the officers had been unable to get a response to intermittent knocking and had heard no sound from inside at all." United States v. Shye, 492 F.2d 886, 890 (CA 6, 1974). Reasonable cause to believe of the existence of anyone inside the apartment was particularly dispelled by the fact that even the audible discussions by Sargent Durette with his men and the Station outside of the defendant's door to the effect that keys to the apartment were being sought and that the search of the other buildings would not be accomplished until this apartment had been searched nevertheless still failed to provoke any sounds whatsoever from within. See United States v. Scott, supra at 699-700.

The fact that Sargent Durette and his Team waited outside the apartment for some thirty minutes while efforts were made to

obtain the keys indisputably demonstrates that he assumed that the assailant was not in the apartment. United States v. Houle, 603 F.2d 1297, 1300 (CA 8, 1979); United States v. Lindsay, 506 F.2d 166, 172 (US App. DC, 1974). If anything should be obvious, it is that Sargent Durette and his Team would have immediately broken down the defendant's door if they had even the slightest suspicion that the assailant was inside the apartment.

The facts of this case also reveal no "exigent circumstances" to excuse the police from failing to secure that "neutral and detached" judgment of a magistrate and the issuance of a warrant to enter the defendant's apartment. As a result of the mistaken assumption by the police that the shot had been fired from inside the Police Station, the police had already given any possible assailant located in the area of the defendant's apartment the opportunity to flee or secrete any evidence of the crime. That opportunity was repeated when the police commenced their sweep search with the building at the corner of Merrimack and Chestnut Streets, rather than the buildings on Manchester Street, where the defendant's apartment was located.

The initial concern of the police about the possibility of another shot had long since dissipated before their entry into the defendant's apartment. Over two hours had elapsed from the initial incident without any additional shots being fired. Furthermore, the apparent target of the attack, Mrs. Perreault, had been removed to the

hospital immediately after the Station had been declared clear.

The lack of continuing danger was indicated not only by the fact that no second shot was fired, but also by the fact that many of the officers involved in the investigation had exposed themselves as targets for any possible assailant who might still have been inclined to fire another shot. The entire area was illuminated by street lights and the lights to the Station itself had even been turned back on by the time that the police broke into the defendant's apartment. During the sweep search of the Manchester Street buildings, policemen were deployed on both sides of the buildings and were even scaling the fire escapes to search the rooftops. Indeed, Deputy LeBoeuf testified that he himself had walked right in front of the Station on Chestnut Street past the plate glass window through which the bullet had apparently been fired when he entered the Station as early as 1:20 a.m.

During the entire time that Sargent Durette and his Team awaited the key to the defendant's apartment, that apartment was completely surrounded by law enforcement personnel. Police officers were located on Manchester Street and in the back alley. Likewise, Sargent Durette had stationed one of his men in the first floor hallway and another in the second floor hallway. The only entrances and exits to the defendant's apartment were to the third floor hallway, which was occupied by Sargent Durette himself and the balance of his Special Reaction Team.

Unless he had wings, no suspect would have been able to escape from or enter the defendant's apartment, or even the building in which it was located.

Likewise, if anyone located in the defendant's apartment had been inclined to dispose of evidence of the crime, the opportunities for such had long since passed. Sargent Durette and his Special Reaction Team did not arrive in the building until approximately an hour and a half after the shooting. Once there, they made their presence known by conversations among themselves, conversations with Mrs. Berlinguette and repeated banging and pounding upon the defendant's doors with their fists, flashlights and night sticks.

The gist of the "exigent circumstances" exception to the Fourth Amendment's requirement for a warrant is the existence of some emergency requiring immediate reaction by law enforcement officials to the situation in order to apprehend a felon or prevent the destruction of evidence. E.g., Warden v. Hayden, 387 U.S. 294, 18 L.Ed.2d 782 (1967); Ker v. California, 374 U.S. 23, 10 L.Ed.2d 726 (1973); Carroll v. United States, 267 U.S. 132, 69 L.Ed. 543 (1925). See generally, United States v. Matlock, 415 U.S. 164, 178, 39 L.Ed.2d 242, 253 (1974) (dissenting opinion).

> Terms like "exigent circumstances" or "urgent need" are useful in underscoring the heavy burden on the police to show that there was a need that could

> not brook the delay incident to obtaining a warrant, and that it is only in light of those circumstances and that need that the warrantless search meets the ultimate test of avoiding condemnation under the Fourth Amendment as "unreasonable."

Dorman v. United States, 435 F.2d 385, 392 (US App. DC, 1970).

The mere fact that the delay required to obtain a warrant would result in some "inconvenience" to the police officers is insufficient excuse to bypass the Constitutional requirement for a warrant. Johnson v. United States, 333 U.S. 10, 15, 92 L.Ed. 436, 441 (1948). While the fact that the police officers have the opportunity to obtain a warrant is not alone determinative of the constitutionality of a warrantless search, "it will be fatal unless there are at least some countervailing factors." Niro v. United States, 388 F.2d 535, 539 (CA 2, 1968). Compare, United States v. Rabinowitz, 339 U.S. 56, 98 L.Ed. 653 (1950), with, Trupiano v. United States, 334 U.S. 669, 92 L.Ed. 1663 (1948). In other words, delay in securing a warrant must be for a justifiable reason, such as securing additional evidence to support probable cause, as opposed to utilizing the delay as a subterfuge for avoiding the warrant procedure. Compare, United States v. Ferrara, 539 F.2d 799 (CA 1, 1976), with, United States v. Matlock, 415 U.S. 164, 178, 39 L.Ed.2d 242, 253 (1974)(dissenting opinion), and, United States v. Shye, 492 F.2d 886, 890 n.4 (CA 6, 1974).

The factors to be considered in determining the existence of "exigent circumstances" have probably been best delineated by the case of Dorman v. United States, supra at 392-393, as follows:

> 1. That a grave offense is involved, particularly one that is a crime of violence;
> 2. That the suspect is reasonably believed to be armed;
> 3. That there exists not merely that minimum of probable cause that is requisite even when a warrant has been issued, but beyond that a clear showing of probable cause, including "reasonably trustworthy information", to believe that the suspect committed the crime involved;
> 4. Strong reason to believe that the suspect is in the premises being entered;
> 5. A likelihood that the suspect will escape if not swiftly apprehended;
> 6. The circumstance that the entry, though not consented, is made peaceably;
> 7. That the entry is made in the daytime.

In the case at bar, the Trial Court stated in its opinion that, "it should be noted that all these considerations were present in this case with the possible exception of the sixth". Page 9, Appendix B. Besides the fact that the Trial Court ignored the seventh criterion outlined in Dorman, the Court was clearly in error in applying the relevant considerations to this case. As has been

demonstrated above, factors three and four relating to probable cause did not exist in this case. Additionally, factors six and seven were obviously not present in that the etnry to the defendant's apartment was a forceable, nighttime intrusion. Finally, factor five could hardly apply in view of the total police control over any and all exits from the defendant's apartment. In summary, the only Dorman criteria satisfied in this case were numbers one and two.

It is instructive to examine the facts of the Dorman case itself to determine the appropriate applicability of its "exigent circumstances" criteria. The case involved an armed robbery, a circumstance which clearly satisifed factors one and two. On the other hand, the probable cause factors (three and four) were overwhelmingly present by virtue of the fact that the defendant in that case had left a copy of his probation report at the scene of the crime which identified his name and address. Although the police entry was at night (factor seven), it was accomplished peaceably (factor six). Finally, when the police arrived and announced to the defendant's mother their intention to enter the premises, they "heard a noise from one of the back bedrooms" indicating the presence of the suspect on the premises and the likelihood that he would escape (factors four and five). Considering therefore that all of the "exigent circumstances" factors enunciated by the Court were present with the exception of a daytime entry, the Court found the warrantless entry into the defendant's home to be constitutional.

Similarly, the Court in Vance v. State of North Carolina, 432 F.2d 984 (CA 4, 1970) applied the Dorman criteria to the facts of that case and found a warrantless entry to be lawful under the Fourth Amendment. Again, the case involved an armed robbery and a concrete identification of the defendant as the perpetrator. In fact, the Court stated that, "the existence of probable cause is so clear that Vance does not contest it." The Court further noted that the defendant was already a fugitive from justice, having absconded from parole, thereby demonstrating the likelihood of his escape. Finally, the police entry into the defendant's rooming house was peaceful and made in the daytime.

Although not expressly following the Dorman criteria, a third case finding the existence of "exigent circumstances" is also illustrative. In United States v. Picariello, 568 F.2d. 222 (CA 1, 1978), the Court legitimized the warrantless entry into the home of a suspect of the 1976 series of New England dynamite bombings. Again, the defendant had been specifically identified as the perpetrator of the crime and probable cause was clear. Furthermore, the entry into the defendant's home was peaceable and made in the daytime. Since the case involved a search for evidence, rather than the person of the defendant, there was no need to consider whether or not there was "strong reason to believe the suspect is in the premises" or "a likelihood that the suspect will escape if not swiftly apprehended". On the other hand, it is important to note that even the warrantless entry that was sustained by the Court was accomplished merely for the purpose of securing the defendant's apartment pending the arrival of a search warrant and that no search was conducted until the warrant arrived.

In addition to the existence of almost all of the relevant Dorman criteria, all three cases cited above have in common one other essential distinguishing factor from the case at bar. In each of those cases, the police had either attempted unsuccessfully to obtain a warrant, were in the process of obtaining a warrant or had actually obtained a defective warrant by the time that they made their warrantless entry into the home of the suspect in question. In Dorman, the police had drawn an affidavit and application for a warrant, but were unable to locate a magistrate to issue the warrant. 435 F.2d 385, 387-388. In Picariello, the police were in the process of preparing the paperwork and obtaining a search warrant when officers were sent to the suspect's home to secure it pending the execution of the warrant. 568 F.2d. 222, 225. Finally, in Vance, the police had in fact obtained a warrant prior to their entry into the suspect's home, but the warrant was defective becauce it had not been issued by a neutral and detached magistrate. 432 F.2d 984, 986-987.

In other words, in each of the three cited cases sustaining "exigent circumstances" searches, the law enforcement officials had demonstrated a good faith attempt to comply with the warrant procedures of the Fourth Amendment. See also, United States v. Ferrara, 539 F.2d 999 (CA 1, 1976). By way of contrast, the police officers in the present case made no attempt whatsoever to obtain a search warrant. The facts clearly indicate that the opportunity to do so existed. Judge Capistran, a local magistrate, was available throughout the evening and was in fact called upon later--after the initial warrantless entry--to issue a search warrant at an early hour of the morning.

The cases are legion in condemning warrantless searches similar to that which occurred here. For example, in United States v. Chadwick, 433 U.S. 1, 53 L.Ed.2d 538 (1977), the Supreme Court determined that a search of a locked footlocker seized at the time of the arrest of two defendants, but not broken into and opened until an hour and one-half later was unlawful. The Court held as follows:

> There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides.

53 L.Ed.2d 538, 548. Similarly, in G.M. Leasing Corporation v. United States, 429 U.S. 338, 50 L.Ed.2d 530 (1977), the Court ruled unconstitutional a warrantless entry into a suspect's office one day after police had acquired sufficient facts to establish probable cause, but had forgone the opportunity to obtain a warrant. See also, Chapman v. United States, 365 U.S. 610, 5 L.Ed.2d 828 (1961); McDonald v. United States, 335 U.S. 451, 93 L.Ed. 153 (1948); Trupiano v. United States, 334 U.S. 10, 92 L.Ed. 436 (1948); Johnson v. United States, 333 U.S. 10, 92 L.Ed. 436 (1948); Taylor v. United States, 286 U.S. 1, 76 L.Ed. 951 (1932).

In United States v. Wilcox, 357 F.Supp. 514 (EDPa. 1973), Government agents investigating a bank robbery obtained solid information as to the identity and home address of the perpetrator. They further

possessed reliable information that the suspect planned to return to that address in order to leave some money for his family and that he then intended to leave town immediately. Despite having such information, the agents made no attempt to secure a search warrant and went instead to the suspect's home to place it under surveillance. Approximately one and a half hours after they had acquired the necessary information, the agents made a peaceable entry into the defendant's apartment. The District Court found an "absence of exigent or exceptional circumstances" and granted the defendant's motion to suppress the fruits of the agents' search of his apartment. See also, United States v. Shye, 493 F.2d 886 (CA 6, 1974); State v. Allen, 113 N.J. Super. 245, 273 A.2d 587 (1970).

As was indicated above with respect to the issue of probable cause, the police officers in the case at bar had no reason to believe that "exigent circumstances" still existed at the time that they broke into the defendant's apartment. The most graphic indication of the lack of any such belief is again the fact that they calmly waited for over one-half hour outside the defendant's apartment while attempts were made to secure keys from the landlord. Quite obviously, Sargent Durette and his Team did not at that point perceive any emergency. If they had, there can be no doubt that they would have immediately broken into the defendant's apartment.

The testimony of Sargene Durette indicates that the warrantless entry into the defendant's apartment was made not on the basis of any urgent crisis, but because the standard operating procedure of the Special Reaction Team required that the apartment be searched. As in the case of United States v. Wilcox, supra at 519:

> Here, the absence of exigent or exceptional circumstances is most clearly demonstrated by the conduct of the agents themselves.

See also, United States v. Houle, 603 F.2d 1297, 1300 (CA 8, 1979).

II. The New Hampshire Supreme Court Erroneously Applied A Standard of Probable Cause For A Warrantless Entry And Search Of The Defendant's Apartment Which Was No Greater Than That Required To Sustain An Entry Or Search With A Warrant.

The New Hampshire Supreme Court sustained the Trial Court's determination that probable cause existed to believe that "the "thing" sought, the sniper, was located in the place to be entered and searched". Pages 7-8, Appendix A. In so doing, the Court stated that, "the probable cause required for a warrantless search under the exigent circumstances exception is at least as great as that required to support a warrant." Page 6, Appendix A. (Emphasis supplied).

The Court, however, did not purport to utilize any higher standard of probable cause than that required to sustain the issuance of a search or arrest warrant.

The defendant had argued in his brief on appeal before the New Hampshire Supreme Court that the probable cause standard for a warrantless search was indeed more stringent than that applicable to search or arrest warrants. The defendant again specifically raised that issue in his motion for rehearing. Pages 3-4, Appendix C. The New Hampshire Supreme Court, however, denied the defendant's motion for rehearing, without opinion, and merely modified its prior decision and order in other respects.

This Court has not specifically ruled upon the issue. In Recznick v. City of Lorain, 393 U.S. 166, 169-170, 21 L.Ed.2d 317, 321 (1968), the Court utilized the language parroted by the New Hampshire Supreme Court in holding that the degree of probability required in warrantless searches is "at least as much [as] is required to support a search [with] a warrant". (Emphasis supplied) Since the Recznick decision, the Court has not had occasion to directly clarify its opinion on the issue. On the other hand, the Court has held on several occasions that the quantum of probable cause required by the Fourth Amendment may well vary according to the nature of the search at issue. E.g., United States v. U.S. District Court, 407 U.S. 297, 322-323, 32 L.Ed.2d 752, 769-770 (1972); Camera v. Municipal Court, 387 U.S. 523, 534-535, 18 L.Ed.2d 930, 939 (1967).

Several lower courts have specifically addressed themselves to the probable cause element of a warrantless criminal search. For example, the United States Court of Appeals for the District of Columbia Circuit, in the seminal

case of Dorman v. United States, 435 F.2d 385, 392-393 (U.S. App. DC, 1970), described the degree of probable cause required to sustain a warrantless search as follows:

> Third, that there exists not merely the minimum of probable cause that is requisite even when a warrant has been issued, but beyond that a clear showing of probable cause, including "reasonably trustworthy information" to believe that the suspect committed the crime involved.
>
> Fourth, strong reason to believe that the suspect is in the premises being entered.

The D.C. Circuit further held that if a warrantless entry occurred in the nighttime (as it did in this case), it may, "elevate the degree of probable cause required, both as implicating the suspect and as showing that he is in the place entered". Id. at 393. See also, United States v. Ferrara, 539 F.2d 799 (CA 1, 1976); United States v. Brightwell, 563 F.2d 569, 571 (CA 3, 1977) (Dissenting opinion).

Presently pending before this Court is the case of Riddick v. New York, 45 N.Y. 2d 300, 380 N.E. 2d 224 (1978), prob. jur. noted, 47 U.S.L.W. 3408 (1978). This case squarely presents the issue as to whether or not a warrantless entry into a suspect's home for an arrest of the suspect therein violate the Fourth Amendment if founded upon probable cause, but in the absence of exigent circumstances. It has been suggested that, despite the numerous statements of the Court to the contrary, the issue is still unresolved. E.G., United States v. Watson, 423 U.S. 411, 418, n.6, 46 L.Ed.2d 598 605 (1976). Indeed, there does presently

exist a split of authority on this issue among the Courts of Appeals. Compare, e.g., United States v. Reed, 572 F.2d 412 (CA 2, 1978); Dorman v. United States, supra; with, United States v. Williams, 573 F.2d 348 (CA 5, 1978).

To the extent that this Court should determine, as is argued above, that exigent circumstances did not exist in the case at bar, the same issue may be raised in this case as is presented by the Riddick case. The word "may" is used advisedly because it is by no means clear that the entry into the defendant's apartment in this case for purposes of generally searching for an assailant is the same as an entry into a home for the purpose of arresting a specific, identified individual, such as was the case in Riddick. In any event, the defendant herein strenuously urges the Court not to emasculate its prior decisions and to reaffirm the requirement of exigent circumstances in warrantless entries of citizens' homes.

Whatever the outcome of the Riddick case, it is suggested that the Court ought to clarify the probable cause requirement for warrantless entries into private homes. To the extent that the Court broadens--as is recently has--the exceptions to the warrant requirements of the Fourth Amendment, the Court ought simultaneously to strengthen the requirement of probable cause. It is simply all too easy to intuitively justify a warrantless search by what that search revealed.

If police officers are to be relieved of the responsibility of securing the precedent judgment of a neutral and detached magistrate, the Constitution demands that they be held to a higher standard of certitude that the object or person sought was involved in a criminal act and is present in the place to be entered. As held by the court in Dorman v. United States, supra, this is particularly true when the entry invades a citizen's highest expectation of privacy, i.e., his home at night.

As is argued above, the police officers in this case did not even have enough probable cause to justify the issuance of a warrant. Applying the test of Dorman, they certainly would have been unable to make a "clear showing" or to offer a "strong reason" that the assailant was in this location.

Even assuming--as the defendant does--that the requirement of exigent circumstances to justify warrantless entries will be preserved by this Court, it is not sufficient to secure those rights guaranteed by the Fourth Amendment. In the absence of a warrant, the standard of probable cause should be similar to the sometimes applicable "clear and convincing" burden of proof that lies between "a preponderence of the evidence" and proof "beyond a reasonable doubt."

The excess of zeal induced by the injury to "one of their own" does not excuse the invasion of the rights of other citizens. As the Fourth Circuit recognized in an undoubtedly more egregious, but still not too dissimilar case, the fact of injury to a fellow police

officer does not excuse a blanket, warrantless, residential search not based upon adequate probable cause. Lankford v. Gelston, 364 F.2d 197 (CA 4, 1966).

III. The New Hampshire Supreme Court Erroneously Upheld The Warrantless Entry Into And Search Of The Defendant's Apartment In The Absence Of A Subjective Belief By The Police Officers As To The Existence Of Probable Cause And Exigent Circumstances.

Assuming arguendo that objective probable cause and exigent circumstances existed in this case, it is clear beyond cavil that the police officers involved in the break-in of the defendant's apartment did not themselves believe that the assailant that they were seeking would probably be found within or that an emergency requiring immediate action existed. The testimony is clear that it was the SOP (standard operating procedure) of the Manchester Police Department that dictated the entry into the defendant's apartment.

Sargent Durette testified that he had made the determination to search every single shop and apartment in his path at the time that he commenced his sweep search down Manchester Street. When his Special Reaction Team came to the obstacle presented by the locked doors to the defendant's apartment, the entire sweep search was shut down. This was not because of any belief that the assailant or evidence was located in the defendant's apartment, but because it was standard procedure for his Team not to leave any building and proceed to another until every single apartment or shop had been searched in the first.

Had Sargent Durette believed that the assailant was present in the defendant's apartment, he would have brooked no delay in gaining entry. Instead, he halted his search and directed that an attempt be made to obtain a set of keys for the apartment. Certainly no sense of urgency is revealed by his vigil outside the apartment for approximately one-half hour while awaiting the arrival of the keys. As far as Sargent Durette was concerned, the real search--the search for Bruce Perreault--was proceeding elsewhere in the City.

Even a request from other members of the Team to continue on with the search of other buildings in the suspected area was denied. Again, this was not because of any direct concern with the defendant's apartment, but because it was "our policy and our SOP in building searches."

In its opinion, as originally issued and as modified, the New Hampshire Supreme Court totally ignored the subjective aspect of probable cause and exigent circumstances. The Court stated in its opinion that, "in the present case, it is not our task to review the propriety of the entire sweep search conducted by members of the Manchester Police Department". Page 6, Appendix A. Although the defendant specifically raised the subjectivity issue in his brief on appeal and in his motion for rehearing (Pages 1-2, Appendix C), the Court declined to test the conduct of the police by anything other than an objective standard.

In Terry v. Ohio, 392 U.S. 1, 21-22, 20 L.Ed.2d 889, 906 (1968), the Court held that,

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged enforcing the laws can be subjected to the more detached neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?

It is clear, therefore, that the facts justifying a search or seizure must, at a minimum, be tested against an objective standard of probable cause.

On the other hand, the Court has not suggested that the absence of subjective probable cause is irrelevant to the dictates of the Fourth Amendment. The Court has merely stated that, "if subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate". Beck v. Ohio, 379 U.S. 89, 97 13 L.Ed.2d 142-148 (1964) (Emphasis supplied).

In Baker v. McCollan, ___ US ___, 47 U.S.L.W. 4834, 4835 n.1 (June 26, 1979), the Court noted in its discussion of the requisite mental elements establishing a claim for damages under 42 U.S.C. §1983 for violation of Fourth Amendment rights as follows:

> Of course, the state of mind of the defendant may be relevant on the issue of whether a constitutional violation has occurred in the first place, quite apart from the issue of whether §1983 contains some additional qualification of that nature before a defendant may be held to respond in damages under its provisions.

See also, Michigan v. DeFillippo, ___ US ___, 47 U.S.L.W. 4805 (June 25, 1979).

As the Court has stated, "the purpose of the Exclusionary Rule is to deter unlawful police action". Michigan v. DeFillippo, supra at 4807 n.3. It therefore cannot be irrelevant that the police officials who are charged with enforcing the Fourth Amendment engage in warrantless entries of private dwellings when they do not themselves actually believe that probable cause or exigent circumstances exist. So long as law enforcement officers may safely run the risk that the hindsight of a reviewing court may determine that sufficient facts did exist to "give reason" for the entry, they will have no real incentive to restrain themselves in cases of doubt. As the Court stated in Vance v. State of North Carolina, 432 F.2d 984, 991 (CA 4, 1970),

> Although the constitutionality of an arrest must always be objectively

> determined, it is not irrelevant to consider how the conduct of the police may have appeared to them and to the one arrested. For how it seemed to them may tend to affect behavior, and it is lawless behavior that is the concern of the fourth amendment.

The case of Thompson v. Anderson, 447 F.Supp. 584 (D.Md., 1977), is particularly instructive. That case involved a damage claim under 42 U.S.C. §1983 against a police officer who had arrested the plaintiff without a warrant and without probable cause pursuant to the standard operating procedure of the Baltimore Police Department. The practice of the Department was to authorize "try ups", or dwelling searches for specified wanted persons, without seeking a warrant, when the pursuit of the suspect occurred reasonably promptly after the commission of the crime. The Court held that the defendant had reasonably and sincerely relied upon the SOP of the Department and that he was therefore entitled to the so-called good faith defense to a §1983 action. On the other hand, the Court went out of its way to comment upon the impact of the police officer's mental state upon the constitutionality of the arrest (id. at 598):

> These facts, together with absence of malice on Anderson's part toward Keith, his mother or anyone else involved and the following by Anderson of accepted police practice entitle Anderson successfully to assert, on both a subjective and an objective basis, his good faith defense. In so concluding, it would not seem inappropriate for the Court

> to comment then that in its view the law does not constitutionally permit a warrantless entry into a suspect's home unless there is probable cause to believe that the suspect is at home, even in a "hot pursuit" case, except perhaps under exceptional circumstances not present herein . . .While Anderson in ordering that "try up" acted in accordance with Baltimore City Police Department practice and procedure, the latter and Anderson's said order would seem constitutionally deficient.

See also, United States v. Houle, 603 F.2d 1297, 1300 (CA 8, 1979).

The search conducted by Sargent Durette and his Special Reaction Team in this case constitutes the very type of a generalized, exploratory search which goes to the heart of what the Fourth Amendment was meant to protect. Even assuming that sufficient objective facts did exist to establish probable cause and exigent circumstances to justify the forceable entry into the defendant's apartment, the lack of any subjective belief upon the part of the police officers that the assailant was present in that apartment or that an emergency existed should vitiate the legality of the entry. For if the dictates of an SOP can justify a sweep search such as occurred in this case, then the rights of citizens to be "secure in their persons, houses, papers and effects" shall surely be diminished.

It is indeed in the case of a sweep search that subjectivity is particularly relevant. We deal here not with the case of a police officer who has personal doubts as to whether or not the facts amount to probable cause, but a procedure in which the whole issue of probable cause is ignored. It is the inexorable command of the sweep search and the SOP that all buildings, all homes and all apartments be searched, regardless of the circumstances. To test the constitutionality of such official action simply by the use of objective hindsight is not to enforce the Fourth Amendment, but to invite its violation. To repeat the language of the Court in Coolidge v. New Hampshire, 403 U.S. 443, 454-455, 29 L.Ed.2d 564, 576 (1971),

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the value that it represents may appear unrealistic or "extravagant" to some. But the values are those of the authors of our fundamental constitutional concepts. . .If times have changed, reducing every man's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less important.

CONCLUSION

For the reasons stated above, the defendant respectfully prays that the writ of certiorari be granted.

Respectfully submitted,

Thomas H. Theodosopoulos
By His Attorneys:
WADLEIGH, STARR, PETERS,
DUNN & KOHLS

By: Eugene M. Van Loan III
Eugene M. Van Loan, III

Supreme Court, U. S.
FILED
APR 4 1980
MICHAEL RODAK, JR., CLE

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1558

THOMAS H. THEODOSOPOULOS,
Petitioner

v.

STATE OF NEW HAMPSHIRE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE
APPENDICES

Eugene M. Van Loan, III, Esquire
95 Market Street
Manchester, New Hampshire 03101
(603) 669-4140
Counsel for the Petitioner

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APPENDIX A.

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

[redacted]
CAROL A. BELNAIN
DEPUTY CLERK

1 9 8 0

January 7

FRANK ROWE KENISON
SUPREME COURT BUILDING
CONCORD, N. H. 03301
(603) 271-2646

Peter W. Heed, Esq.
Assistant Attorney General
State House Annex
Concord, NH 03301

Eugene M. Van Loan, III
Wadleigh, Starr, Peters, Dunn & Kohls
95 Market St.
Manchester, NH 03101

In re 78-248 State v. Thomas H. Theodosopoulos

Gentlemen:

On January 4, 1980, the supreme court denied the defendant's motion for rehearing and modified the opinion that had been issued on August 17, 1979 (distributed 9/14/79). I enclose a copy of the order.

The modifications appear on pages 7 and 13 of the enclosed copy of the manuscript.

Very truly yours,

Donna R. Craig
Office of the Clerk
Donna R. Craig

cc: Flynn, J.
Capistran, J.
Robert Murphy, Comm'r

Enclosures

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 78-248 State v. Thomas H. Theodosopoulos

the court upon .....January 4, 1980.....made the following order:

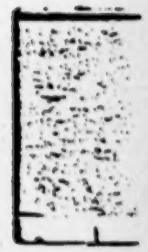
Motion for rehearing denied; opinion modified.

Concord,

.....1/7/80.....

George S. Pappagianis,
Clerk,

ter W. Heed, Esq.'
gene M. Van Loan, III, Esq.
bert Murphy, Comm'r
ynn, J.
pistran, J.



Hillsborough
No. 78-248

(137)

THE STATE OF NEW HAMPSHIRE

v.

THOMAS H. THEODOSOPOULOS

August 17, 1979

~~(distributed 9/)~~

Thomas D. Rath, attorney general, and (Peter W. Heed, assistant attorney general, orally), for the State.

Wadleigh, Starr, Peters, Dunn & Kohls, of Manchester (Eugene M. Van Loan, III orally), for the defendant.

BROCK, J. This case requires us to consider the constitutionality of a search conducted by the Manchester Police Department after a sniper shot was fired into the Manchester Police Station, seriously wounding two persons. The defendant was indicted on two counts of attempted manslaughter under RSA 630:2, 629:1. In this interlocutory appeal, the defendant excepts to the ruling of the Hillsborough County Superior Court (Flynn, J.) denying his motion to suppress physical evidence taken from his apartment and any statements he may have made at the time of the search.

Shortly after midnight on the morning of December 31, 1977, Mrs. Dorothy Perreault came to the Manchester Police Station to complain that her son had threatened her with a gun. At approximately 12:50 a.m., while she was standing at the desk in the lobby talking with police Captain Evangelos P. Xiggoros, a shot was fired. The bullet struck and seriously wounded both Mrs. Perreault and Captain Xiggoros.

State v. Theodosopoulos

The other police officers in the station reacted immediately by turning off all lighting in the building. They summoned several off-duty officers to the station, including a "Special Reaction Team" trained to respond to emergencies such as sniper fire. Because the shot was initially assumed to have been fired from within the station, the officers surrounded the station with patrol cars and uniformed officers, and thoroughly searched the interior of the station. They feared that the unknown assailant, whom they characterized as a sniper, remained positioned to fire additional shots. When Sergeant Louis Durette arrived, at 1:20 a.m., he observed policemen concealed behind cement walls and in doorways, and an officer called out to him, "Sarge, keep down. We don't know where the sniper is."

By approximately 1:45 a.m., the interior search was completed and the officers realized that the bullet had in fact come from outside the station. One group of officers then left the station environs to attempt to locate the Perreault boy as a possible suspect. A second group attempted to reconstruct the shooting to determine where the bullet had come from. A large bullet hole was discovered ten or eleven feet above the lobby floor in one of the large panes of glass that form the front wall of the police station facing Chestnut Street. With this new information, Sgt. Durette and the eighteen-man special reaction team first searched a large abandoned church building on the corner of Chestnut and Merrimack Streets, directly across Chestnut Street from the police station. When they found no evidence of the assailant, they returned to the station. Sgt. Durette and two other officers then lined up the

bullet hole in the window with the victims' locations when they had been hit. They concluded that the shot had probably been fired from a row of multi-storied apartment buildings extending westward down Manchester Street from the corner of Chestnut Street. The rear windows and fire escapes of these buildings faced a wide parking area and an alley that separated them from the abandoned church. There was a direct sight line from the front wall of the police station down the alley to the rear windows on the second and third stories of the apartment buildings. The special reaction team immediately began a methodical search of that row of buildings, both rooftops and interiors, beginning with a small store located on the corner closest to the police station. By that time it was about 2:05 a.m., one hour and fifteen minutes after the shot had been fired.

The search of the first few buildings yielded nothing. At about 2:15 a.m., eight officers entered a four-story apartment building at 83 Manchester Street. The ground floor and cellar were found to be clear, and an officer was posted to prevent anyone from leaving the building. The officers awakened the occupant of the second floor apartment, told her that there had been a shooting, and searched her apartment with her consent, without finding any sign of an assailant. She told them that she had not heard any shots or noise from upstairs.

Sgt. Durette and the special reaction team then moved upstairs and pounded on the third-floor apartment door. From under the doorway, they observed that a light was on in the apartment, but heard no noise or response. Sgt. Durette

then went down to the second-floor apartment to question its occupant further. According to Sgt. Durette, she told him that the third-floor resident "must be home" because his truck was parked outside. Sgt. Durette returned to the third floor and continued pounding on the door. He sent other members of his team to search the fourth floor and roof. He also communicated with officers at the police station by walkie-talkie and asked that they obtain keys to the third-floor apartment from the owner of the building. One of the special reaction team squads wanted to move on to the next building, but Sgt. Durette was determined to complete the search of that building before moving on.

When the keys arrived, none fit the doors to the third-floor apartment. Sgt. Durette felt that "the whole situation was very grave, . . . people's lives were in danger." He kicked open the weakest door and entered the apartment. It was then about 2:50 a.m., two hours after the shooting and about one-half hour after the search had focused on the third-floor apartment.

Once inside the apartment, the officers fanned out, looking for the person who had fired the shot and whom they thought might be preparing to fire additional shots. Sgt. Durette later testified that he went into the room that had lights on and saw marijuana plants growing in pots on the floor. He proceeded through the kitchen, which faced the alleyway, into a bedroom, also on the alleyway, where he found the defendant, apparently asleep. On a bureau, in plain view, were empty .350 caliber shell casings and a rifle scope. Other officers,

looking for a possible second person, entered the bathroom, adjacent to the kitchen and also facing the alleyway, and noticed a broken window from which there was a clear line of sight to the glass wall of the police station where the bullet had entered. The officers, with some difficulty, managed to arouse the defendant and took him to the police station where he was booked for the shooting.

A short while later, at about 6:00 a.m., relying primarily on facts discovered during the initial entry, the police obtained a search warrant from the Manchester District Court (Capistran, J.). While executing this warrant, the police thoroughly searched the defendant's truck and apartment, including a locked closet, and found and seized several items, including a pellet rifle, a 16-gauge shotgun, and a .350 caliber rifle. The defendant moved to suppress all physical evidence taken from his apartment and his truck, as well as any statements he might have made during and immediately after the initial search.

A warrantless search is per se unreasonable and invalid, unless it comes within one of a few recognized exceptions. Mincey v. Arizona, 437 U.S. 385, 390 (1978); State v. Thorp, 116 N.H. 303, 308, 358 A.2d 655, 660 (1976), citing Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); see U.S. CONST. amend. IV; N.H. CONST. pt. I, art. 19. We have held that the State has the burden of proving by a preponderance of the evidence that a warrantless search was constitutionally permissible. State v. Osborne, 119 N.H. , 402 A.2d 493 (1979); see Arkansas v. Sanders, 47 U.S.L.W. 4783, 4783 (June

20, 1979). The recognized exception that the State relies on in this case is that of probable cause to search plus exigent circumstances. See Warden v. Hayden, 387 U.S. 294 (1967); State v. Beede, 119 N.H. , A.2d (1979)(decided this day). The probable cause required for a warrantless search under the exigent circumstances exception is at least as great as that required to support a warrant. State v. Thorp, 116 N.H. at 306, 358 A.2d at 658, citing Wong Sun v. United States, 371 U.S. 471, 479 (1963); cf. United States v. Ferrara, 539 F.2d 799 (1st Cir. 1976) (warrantless search requires more probable cause).

In the present case, it is not our task to review the propriety of the entire sweep search conducted by members of the Manchester Police Department or of their search of stores and apartments other than the one occupied by the defendant. United States v. Scott, 520 F.2d 697 n.1 (9th Cir. 1975), cert. denied, 423 U.S. 1056 (1976). Rather, the issue before us is whether, at the moment the police officers entered the defendant's apartment, they had probable cause to search that particular apartment in connection with the shooting incident. United States v. Scott supra. The information gained as a result of the entry cannot, of course, be used to justify the entry itself. United States v. Di Re, 332 U.S. 581, 595 (1948).

The defendant correctly points out that, prior to the entry, the State did not have any information linking him personally to the crime that had been committed. This case is therefore different from traditional "hot pursuit" cases in which police officers have some clues to the identity of the person or persons they are chasing. See, e.g., Warden v.

Hayden, 387 U.S. 294 (1967); State v. Thorp, 116 N.H. 303, 358 A.2d 655 (1976). Compare Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970), with United States v. Lindsay, 506 F.2d 166 (D.C. Cir. 1974). In the present case, the determination whether probable cause for the search existed turns on whether, at the time of the entry, the officers reasonably believed that the "thing" sought, the sniper, was located in the place to be entered and searched. Zurcher v. The Stanford Daily, 436 U.S. 547, 556 (1978); State v. Doe, 115 N.H. 682, 685, 371 A.2d 167, 169 (1975); People v. Superior Court, 150 Cal. Rptr. 227, 232, 86 Cal. App. 3d 366, 373 (1978); People v. Mitchell 39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246, cert. denied, 426 U.S. 953 (1976); Grimes, Probable Cause in the Zurcher Case, 17 Judges' Journal 25 (1978).

The record shows that the officers had calculated the bullet trajectory sufficiently to focus their search on a particular row of buildings along Manchester Street. By the time they reached the defendant's apartment, they had searched a significant ~~portion~~ number of ~~the~~ these buildings ~~that had windows facing the police station,~~ and had secured ~~the~~ those buildings, which were closer to the police station than the defendant's. Cf. People v. Bradford, 28 Cal. App. 3d 695, 104 Cal. Rptr. 852 (1972) (apartment house); People v. Mitchell, 39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246, cert. denied, 426 U.S. 953 (1976) (hotel). The defendant's apartment was on the third floor, at a height compatible with the bullet path. Lights were on in the apartment and the defendant's truck was parked outside, leading the officers to believe that the apartment was occupied. When

no one responded to their persistent knocking, they had reason to conclude that the occupant wished to conceal his presence. United States v. Scott, 520 F.2d 697, 700 (9th Cir. 1975), cert. denied, 423 U.S. 1056 (1976). The evidence supports the trial court's finding that the State had sufficient probable cause to search the defendant's apartment.

Probable cause alone, however, is not sufficient to justify the search conducted in this case. See State v. Beede, 119 N.H. ___, ___ A.2d ___ (1979) (decided this day). Ordinarily, any search must be performed pursuant to a judicially issued search warrant. Arkansas v. Sanders, 47 U.S.L.W. 4783, 4785 (June 20, 1979). The warrant requirement is particularly stringent for a search of a private dwelling, in which the occupant has a strong expectation of privacy and protection from government intrusion. See United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976); State v. Beede, supra.

Nevertheless, exigent circumstances may justify a warrantless search where there is a compelling need for immediate official action and a risk that the delay inherent in obtaining a warrant will present a substantial threat of imminent danger to life or public safety. See Mincey v. Arizona, 437 U.S. 385, 392 (1978); Warden v. Hayden, 387 U.S. 294, 298-99 (1967); State v. Slade, 116 N.H. 426, 362 A.2d 194 (1976); Mascolo, The Emergency Doctrine Exception to the Warrant Requirement under the Fourth Amendment, 22 Buffalo L. Rev. 419, 426 (1973).

By statute and at common law, police officers have a duty to act as "conservators of the peace." RSA 105:3; Blais v.

—, —A.2d (1979)(decided this day);

Town of Goffstown, 119 N.H./[redacted] State v. Grant, 107 N.H. 1, 2, 216 A.2d 790, 791 (1966). As such, they have the right, and in some circumstances the obligation, to act expeditiously to protect the public from an armed person, known to be at large, who has just shot and wounded two other persons. See generally Mincey v. Arizona, 437 U.S. at 392; United States v. Barone, 330 F.2d 543, 545 (2d Cir.), cert. denied, 377 U.S. 1004 (1964); Mascolo, supra at 426; Note, 43 Fordham L. Rev. 571, 582 (1975). Whether a situation was sufficiently urgent to permit a warrantless search depends on the totality of the circumstances. United States v. Evans, 481 F.2d 990, 993 (9th Cir. 1973); State v. Mollberg, 310 Minn. 376, 246 N.W.2d 463 (1976). Even if it can be shown after the fact that no emergency existed, the warrantless entry may be sustained as long as the officers' perception of the emergency was reasonably grounded in the facts known to them at the time. Mascolo, supra at 427 n.33.

The record sustains the trial court's finding that a "highly volatile" emergency existed that justified the police entry into the defendant's apartment. A shot fired into the police station at midnight led the police to believe that there was a sniper at large in the immediate vicinity of the police station. Deputy Chief of Police Edmund LeBoeuf, who arrived at the station at 1:20 a.m., testified that the officers "knew a shot was fired and a couple people had been hit. They . . . expected almost anything . . . another shot." They knew that finding a magistrate and obtaining a warrant in the middle of the night could easily take an hour or two. See N.H. Attorney General, Law Enforcement Manual, ch. 7 § 8, at 52 (1972).

At some point, the passage of time during which a warrant could have been obtained destroys the State's claim of exigency. See, e.g., Michigan v. Tyler, 436 U.S. 499 (1978) (several days); G.M. Leasing Corp. v. United States, 429 U.S. 338, 358-92 (1977) (several days); State v. Beede, supra (two days). People v. Hampton, 587 P.2d 275 (Colo. 1978) (40 hours). "[T]he presence or absence of an ample opportunity for getting a search warrant" is a relevant factor in considering the reasonableness of any warrantless search. United States v. Rabinowitz, 339 U.S. 56, 84 (1950) (Frankfurter, J., dissenting); see McDonald v. United States, 335 U.S. 451, 455 (1948). On the other hand, police officers responding to an emergency are not required to initiate a search or arrest at the first moment that probable cause exists. United States v. Weinrich, 586 F.2d 481, 493 (5th Cir. 1978).

In the instant case, the defendant's apartment was searched approximately two hours after the shooting incident, and about one half-hour after the police had sufficient information to constitute probable cause. That delay did not, in and of itself, destroy the emergency and render the search "unreasonable" under the fourth amendment. See United States v. Simmons, 444 F. Supp. 500, 506 (E.D. Pa. 1978), aff'd, 591 F.2d 206 (3d Cir. 1979) (search sustainable even though considerable time had elapsed since onset of exigent circumstances). The police activity here was a methodical, continuous and vigorous attempt to apprehend an armed and dangerous person. See People v.Mitchell, 39 N.Y.2d 173, 383 N.Y.S.2d 246, 347 N.E.2d 246, 347 N.E.2d 607, cert. denied, 426

U.S. 953 (1976). There is no suggestion that the emergency was artificially created by the State's own action or inaction. See Williamson, The Supreme Court, Warrantless Searches, and Exigent Circumstances, 31 Okla. L. Rev. 110, 123 (1978). Nor are there facts tending to show that the State's failure to obtain a warrant reflected an absence of concern for protecting fourth amendment values. See McDonald v. United States, 335 U.S. 451, 455 (1948); United States v. Brightwell, 563 F.2d 569, 576 (3d Cir. 1977) (Lord, J. dissenting). The constitutionality of a given search does not turn on this court's after-the-fact evaluation of whether, as a tactical matter, the police could have deployed their forces differently in response to a confusing emergency situation. United States v. Weinrich, 586 F.2d at 494. We affirm the trial court's ruling that the warrantless entry into the defendant's apartment was both supported by probable cause and justified by a life-endangering emergency created by sniper fire.

The defendant further contends that even if the initial entry was justified, the subsequent search of his apartment exceeded its permissible scope. See United States v. Goldenstein, 456 F.2d 1006 (8th Cir. 1972), cert. denied 416 U.S. 943 (1974); State v. Slade, 116 N.H. 436, 362 A.2d 194 (1976). In particular, he challenges the admissibility of a spent shell found in the living room and the broken bathroom window.

The emergency doctrine cannot be used to justify a search primarily directed towards gathering evidence of past criminal activity, no matter how violent the crime. Mincey v. Arizona,

437 U.S. 385 (1978); Michigan v. Tyler, 436 U.S. 499 (1978); People v. Mitchell 39 N.Y.2d 173, 383 N.Y.S.2d 246, 347 N.E.2d 607, cert. denied, 426 U.S. 953 (1976). An emergency search is "strictly circumscribed by the exigencies which justify its initiation." Mincey v. Arizona, 437 U.S. at 393, quoting Terry v. Ohio, 392 U.S. 1, 25-26 (1968). Once inside the apartment, however, the officers were authorized to conduct a limited search confined to what was reasonably necessary for the purpose of the entry. State v. Slade, 116 N.H. at 438, 362 A.2d at 196. Because the officers did not know the identity or the number of persons involved in the shooting, it was reasonable for them to look for one or more persons, as well as for weapons, in all the rooms of the apartment, especially those with windows facing the alleyway and the police station. See People v. Olajos, 397 Mich. 629, 246 N.W.2d 828 (1976); State v. Max, 263 N.W.2d 685 (S.D. 1978). Once in these rooms, they were not required to close their eyes to items of apparent evidentiary value that confirmed the link between the defendant and the shooting. See Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971); Warden v. Hayden, 387 U.S. 294, 300-01 (1967); State v. Hardin, 90 Nev. 10, 15, 518 P.2d 151, 154 (1974); Mascolo, supra at 426-27.

Pursuant to a warrant supported by an affidavit relying on information gained during the warrantless entry, the officers searched the defendant's truck and apartment, and seized weapons, live and expended ammunition, and marijuana. These items are admissible because the initial warrantless entry was not constitutionally invalid. State v. Osborne, 119 N.H. ,

402 A.2d 493, 496 (1979), citing Wong Sun v. United States, 371 U.S. 471 (1963). The trial court did not err in denying the defendant's motion to suppress this evidence.

The defendant also seeks to exclude "any and all statements . . . issued by the defendant contemporaneous or subsequent to the entry of his apartment," on the ground that these statements, as well as the physical evidence, were tainted by the illegal search.[1] See State v. Beaulieu, 119 N.H. , 402 A.2d 178 (1979). Furthermore, the record before us fails to indicate that the defendant ever made any statements "contemporaneous or subsequent to the entry of his apartment." Notwithstanding the provisions of Rule 98 (now Rule 99) of the Rules of the Superior Court, neither counsel was able to represent at oral argument that any such statements actually exist.

On this interlocutory appeal, we refuse to speculate either as to the existence of such statements or as to bases for their suppression other than the claim made here that the search was illegal.

Exceptions overruled; remanded.

All concurred.

[1] Since we uphold the constitutionality of the search, it provides no basis for suppressing such statemen

APPENDIX B

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

HILLSBOROUGH COUNTY, APRIL TERM, 1978.

STATE

v. STATE #1054A and 1055A

THOMAS H. THEODOSOPOULOS, Defendant.

RULINGS AND FINDINGS
on
DEFENDANT'S MOTION TO SUPPRESS

The defendant, Thomas H. Theodosopoulos, has been indicted under two indictments for attempted manslaughter. Both indictments substantially allege that the defendant on December 31, 1977, "in the general area of 83 Manchester Street, Manchester, New Hampshire, did attempt to commit the crime of manslaughter in that he did commit the following acts, which under the circumstances as he believed them to be, constituted a substantial step toward the commission of said crime of manslaughter in that he did recklessly in the night time fire a loaded rifle . . . through a plate glass window into the illuminated lobby of the Manchester Police Station, situated at 351 Chestnut Street, Manchester, New Hampshire, thereby striking ..." police Captain Evangelos P. Xiggoros and Dorothy Perreault causing them bodily injury.

The defendant moves to suppress all physical evidence taken from him "in his apartment on the third floor at 83 Manchester Street, in Manchester and/or his motor vehicle, New Hampshire Registration EA-2666, and any and all statements, whether (sic) or oral, issued by the defendant contemporaneous or subsequent to the entry of his apartment at 83 Manchester Street, on December 31, 1977. ... ."

At approximately 12:50 a.m., on December 31, 1977, Captain Xiggoros and Mrs. Perreault were standing at the desk in the lobby of the Manchester Police Station when a shot was fired through a window striking both of them. Mrs. Perreault was in the station complaining that her son had made threats on her life.

Initially, the police thought that the shot had been fired by Mrs. Perreault's son, and that the individual responsible for firing the shot was within the station.

Captain Xiggoros and Mrs. Perreault were removed from the station and taken to a hospital. The lights in the station were immediately darkened so that, if any further shots were fired, personnel inside would be protected from further attack. Between 1:00 a.m. and 1:20 a.m., the area around the police station was cordoned off. Numerous police officers were also deployed around the station to prevent the escape of the assailant. After it was determined that the assailant was not in the station and the station was found to be secure, three Special Reaction Team forces, including the one lead by Sergeant Louis Durette, went into operation shortly after his arrival at 1:20 a.m.

Durette was the first to observe the bullet hole in the window which was about five to six inches in diameter and, due to the angle and height of entry, it was thought that the shot had been fired from one of the surrounding buildings. Sergeant Durette's team left the stationhouse and searched a church on the corner of Merrimack and Chestnut Streets. A search of this building and observation of the roof revealed nothing. The search next proceeded to a grinder or sub shop on the west side of Chestnut Street, facing the station. The police could not gain entry, but observation through the windows revealed nothing.

Regrouping back inside the station, the SRT team tried to determine the trajectory of the bullet by lining up the bullet hole in the window and the location where Captain Xiggoros and Mrs. Perreault had been standing. It was determined that the shot probably had been fired from the direction of the rear of apartment buildings facing Manchester Street. The search was then widened to include these neighborhood buildings and rooftops as the police were now looking for a sniper.

It was now about 2:00 a.m. or 2:15 a.m., when the SRT began its search and observations of these Manchester Street buildings. Coming to the building in question at 83 Manchester Street, a search was conducted of the ground floor and nothing was found. On the second floor, a tenant, Mrs. Irene Berlinguette, was aroused from her sleep who, upon questioning, told the police that the defendant lived upstairs but that she had neither seen nor heard anything. Her apartment was also searched with her consent. While the search of the building in question was proceeding, two other teams were also conducting a search of the alley and other buildings in the general vicinity.

The SRT team then went to the third floor where they knocked on the door of the defendant's apartment. Sergeant Durette knew that there was a light on in the apartment. Obtaining no response, the officers inquired of Mrs. Berlinguette whether anyone lived upstairs or was at home. She advised Sergeant Durette that the defendant occupied the apartment and that, if his truck was parked outside, the defendant must be at home. It was discovered that the truck was outside. The police then continued to knock on the door to the defendant's apartment with their nightsticks and knuckles, and still there was no response. Sergeant Durette was determined not to leave the building, because to leave the building without checking the apartment would have been contrary to standard operating procedure in a search of this type.

Arrangements were then made through Officer Murphy at the station to obtain the keys from the landlord. The keys turned out to be the wrong ones, as they failed to fit any of the doors to the defendant's apartment.

Having exhausted all efforts to gain entrance to the apartment and sensing a grave situation where the lives of the police and others could be in danger, Sergeant Durette, at about 3:00 a.m., as team captain, made a decision to enter the apartment without either a search warrant or an arrest warrant. One of the locked doors to the apartment was somewhat loose. Sergeant Durette kicked it open and made an entry.

When the police entered the apartment, they saw nobody in the living room. Having found nothing amiss in the living room, the police continued to investigate the remainder of the premises. In an adjacent room, they observed marijuana. Proceeding through a hallway, they went to the kitchen, which was at the rear facing an alley. The bedroom was to the right of the kitchen, and the bath was to the left. In the bedroom, empty shell casings were observed on a bureau as well as a telescopic sight for a rifle. They then saw the defendant in bed. They shook him and had difficulty in arousing him. The police did not know whether the defendant's drowsiness was due to sleepiness or intoxication or whether it was being feigned. Two men were left to guard him and further investigation of the apartment continued. The police then observed a broken bathroom window that faced the police station. Deputy Chief LeBoeuf was then summoned by Sergeant Durette from the police station across the street. The police also noticed a padlocked closet which they did not attempt to open.

The police managed to wake up the defendant and had him put on his clothes. Deputy LeBoeuf upon his arrival looked at the broken bathroom window and spent cartridges and then advised the defendant that he was to be detained

at the station concerning a shooting incident. Around 3:15 a.m., the defendant was brought to the station and booked.

Later in the morning, at about 6:00 a.m., a search warrant was obtained from Judge Capistran, of the Manchester District Court, on the basis of an affidavit by Lieutenant Crotty that included details from Sergeant Durette, observation of the shell casings, the broken bathroom window and the trajectory of the path from the window to the police station. Around 6:30 a.m., a search of the locked closet was conducted under the search warrant and additional items were removed.

The defendant claims that: (1) the police conducted an invalid search by entering his apartment without probable cause and without a search warrant; and (2) the issuance of a search warrant by Judge Capistran was a product of the prior illegal entry and was also invalid. The defendant therefore maintains that all items or evidence obtained by either search should be suppressed.

The United States Supreme Court has stated that the "core" of the Fourth Amendment is the individual's "privacy against arbitrary intrusion by the police." Wolf v. Colorado, 338 U.S. 25, 27 (1949). Implementing this principle, the Court has mandated that warrantless police invasions of personal privacy "are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967); Vale v. Louisiana, 399 U.S. 30 (1970); Coolidge v. New Hampshire, 403 U.S. 443, 454, 455 (1971). The burden rests upon those seeking exemption from the general rule requiring a warrant to prove that the "exigencies of the situation made that course imperative." McDonald v. United States, 335 U.S. 451, 456 (1956). Subject to that burden, an "emergency doctrine" exception to the Fourth Amendment is recognized.

Warden v. Hayden, 387 U.S. 294, 289 (1967). In short, the Fourth Amendment does not outlaw all warrantless searches, but only those that are unreasonable. State v. Floyd, 116 N.H. 632, 634 (1976); South Dakota v. Opperman, 428 U.S. 364 (1976). The reasonableness of each case must be decided on its own facts and circumstances. Go-Bart Co. v. United States, 282 U.S. 344, 357 (1931); Harris v. United States, 331 U.S. 145 (1947).

New Hampshire applies these principles and follows the rule that the exigencies of a situation with probable cause may justify a warrantless search which might have been unreasonable if emergency circumstances had not existed. State v. Thorp, 116 N.H. 303, 308 (1976); State v. Slade, 116 N.H. 436, 437 (1976); see Coolidge v. New Hampshire, supra at 468.

A threshold issue is whether there was probable cause to make the initial entry. Evidence required to establish probable cause need not amount to what is required to convict. It is not necessary "to prove guilt beyond a reasonable doubt, to make out a prima facie case or even to establish that guilt is more probable than not." State v. Thorp, supra, at 307. The test simply is "whether a reasonable and prudent person in the position of the officer who conducts the search or makes the arrest and possessed of his knowledge would believe seizable items can be found or that an offense has been or is being committed." State v. Thorp, id.

A life-endangering crime had been committed by someone unknown, still at large. The angle and height of entry of the bullet limited the range of possible firing locations to the buildings on Manchester and Chestnut Streets, within view of the station. While the trajectory calculations were not made with a surveyor's precision, the approximation was enough to give the police sufficient information to form a reasonable belief that the shot had been fired from the area of 83 Manchester Street. At the time that the defendant's

apartment was entered, a significant portion of the suspected area had already been searched, so that the probability that the shot was fired from the remaining unsearched area increased.

As the search by Sergeant Durette's team focused on the defendant's apartment, their reason to believe that it might be connected with the attack intensified. A light was observed, which indicated to the officers that someone was present in the apartment. Their belief that someone was present in the apartment was strengthened by the presence of the defendant's truck which, as the police were informed, indicated that the defendant was at home. With a reasonable belief that someone was present in an apartment that was the reasonable object of suspicion, the police were met with no response to their persistent loud knocking. Under these circumstances, the entry was made with probable cause to believe that the apartment's search was necessary in connection with the investigation of the attack on the station.

Having found that probable cause existed for the initial search, the question next becomes whether there were exigent circumstances which justified this search without a warrant. In this case, the exigent circumstances are demonstrated by the facts preceding the search by the police.

The myriad of situations, which have been legally recognized as exigent circumstances, preclude the facile resolution by application of precise rules. Courts have generally tailored the definitions of "emergency" and "exigent circumstances" to the facts of each case. Here, the police were confronted with a totally unforeseeable shooting, perpetrated by an unknown sniper in the dead of night. The shot caused severe bodily injury to a police captain and a civilian standing in the lobby of the police station. Police reaction was swift, and the lights in the station were immediately darkened to obscure the vision of the assailant. The area around the station was cordoned off and

numerous police officers were deployed around the station to prevent the assailant's escape. Observations of the bullet's path soon led police to conclude that the shot had been fired from a building within view of the Chestnut Street entrance. This corroborated their assumption that the shot had been fired by a sniper. Reacting to this grave and uncertain situation, the SRT teams began to search the suspected buildings.

The nature of sniper fire is such that it cannot be known if and when it will be repeated. With the benefit of hindsight, it could be said that one shot was insufficient to create an emergency, but the severity of the crime, coupled with uncertainty about its recurrence, rightfully caused the police to be in constant fear for their own, as well as the general public's safety. This late night emergency did not give police sufficient time to execute an affidavit and present it to a judge to obtain a warrant.

It would have been unreasonable in such a pressing emergency period to require the police, as the defendant urges, to obtain a search warrant to pursue a possibly armed and dangerous assailant. The totality of the circumstances, along with every reasonable inference to be drawn therefrom, demonstrated an immediate need for the police to locate and disarm the suspect as quickly as possible, not only for their own safety but for the protection of the local citizenry as well. There was a need for a prompt response in an urgent situation fraught with imminent danger to thwart another attack. The police could not afford to lose valuable time during the critical phase of this criminal investigation. To take the time to seek a warrant would probably have frustrated the purpose behind the search, and the delay could make the subsequent search meaningless.

The defendant argues that the police had no specific information that linked his apartment to any offense or to any offender. The police according to the evidence searched the area on the first and second floors with

consent and found nothing and then proceeded to the third floor. The defendant argues that the systematic search of these units constituted a general search that could not be justified under the circumstances.

It should be pointed out once again, with respect to this argument, that a pressing emergency existed. Under the circumstances, where a sniper could probably be operating from an apartment building in direct line to the station, it was not unreasonable for the police in hot pursuit to have conducted a search of the apartment in the line of fire, for suspects and weapons. "The law recognizes that fresh pursuit of a fleeing suspect who has committed a grave offense and remains dangerous to life and limb may constitute 'exceptional circumstances' sufficient to justify a search without a warrant...." People v. Smith, 63 Cal.2d 779, 797, 48 Cal. Rptr. 382, 394, 409 P.2d 222, 234 (1966); see also Terry v. Ohio, 392 U.S. 1 (1968), where the court referred to hot pursuit as an instance of exigent circumstances.

In Dorman v. United States, 435 F.2d 385, 392-393 (1970), the Court listed a number of considerations that can be useful if a warrantless search is reasonable. These include: (1) the existence of a grave offense, particularly a crime of violence; (2) the reasonable belief that the suspect is armed; (3) a clear showing of probable cause to believe the suspect committed the crime; (4) strong reason to believe the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) a peaceable entry. It should be noted that all these considerations were present in this case with the possible exception of the sixth.

In Warden v. Hayden, supra, at 298-299, the Court stated, "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only through a thorough search of

the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all the weapons which could be used against them or to effect an escape." (Emphasis added).

There is no doubt that the systematic search in question was an invasion of privacy which ordinarily would be unreasonable and in violation of the Fourth Amendment in the absence of some exigent circumstances. However, as previously indicated, the need for fast and effective law enforcement was overwhelming under the circumstances of this case. It was imperative that the police conduct an immediate and thoroughly intensive search of the area surrounding the police station for persons and weapons involved in the highly volatile situation.

In testing the reasonableness of this search, we should inquire how the situation would have appeared if the sniper had shot and possibly killed other police officers or citizens while the police were taking the time to seek out, present and explain the matter to a magistrate in the early morning hours. It is very possible that somebody could have been wounded or killed if the police had acted with the calm deliberation associated with the judicial process. In this situation, the preservation of human life was paramount to one's privacy under the Fourth Amendment.

One author has summarized the emergency doctrine as follows:

> "Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health or property, and provided further, that they do not enter with an accompanying intent to either arrest or search. If, while on the premises, they inadvertently discover incriminating evidence in plain view, or as a result of some activity on their part that bears a material relevance to the initial purpose for their entry, they may lawfully seize it without a warrant." E. Mascolo, The Emergency Doctrine Exception to the Warrant

Requirement Under the Fourth Amendment, 22 Buff. L. Rev. 419, 426-427 (1973).

In summary, the police were confronted with a violent crime which reasonably justified fears that the unknown perpetrator or perpetrators, who appeared to be armed, posed a substantial threat of imminent danger to life and property and might strike repeatedly if not swiftly apprehended. The police also had reason to believe that there was an urgent need for their assistance so that they should launch and pursue a "fan out" or "protective search" (see 3 Search and Seizure Law Report #8, August, 1976). The investigation was begun, not as a quest for incriminating evidence, but rather to protect life and property by hopefully apprehending the sniper.

After the investigation was begun, there was also a reasonable basis, amounting to probable cause, as previously indicated, to believe that the dangerous criminal was in the apartment building and a further likelihood that he could escape if not apprehended at once. After all efforts of gaining the defendant's attention to enter the apartment without force proved unavailing, pushing in the door to the defendant's apartment at the time was reasonably directed toward an emergency purpose and was not exploratory. This was not a planned warrantless search, but rather it was one that was made in good faith in response to an emergency and not to circumvent the warrant requirement.

In the Court's view, the conduct of the police, under the emergency circumstances and considering the time of the night, was reasonable, and a warrant was not required to enter the defendant's apartment. Therefore, the items obtained in the defendant's apartment after this warrantless but lawful entry, which were inadvertently observed by the police in plain view from a justified position, will not be suppressed. Since the initial entry was

lawful, the subsequent search by a warrant was also lawful, and the items seized under the warrant will not be suppressed.

The defendant, in his motion, also requests that certain statements obtained by the police after the defendant's detention be suppressed. Although the State had the burden of proof under Rule 96 to establish that the statements were legally obtained, the burden of going forward was on the defendant as the movant. Then the burden of persuasion and proof with respect to the admissibility of the statements would shift to the State. The defendant offered no evidence suggesting that the statements were illegally obtained. Not having satisfied his burden of going forward by introducing some evidence, the defendant's motion to suppress the statements will be denied. If the basis for the suppression of the statements was that they were tainted as a result of illegal searches, then the motion is denied in that it has been ruled that both searches were legally conducted.

In view of the above findings and rulings, the defendant's motion to suppress is denied.

Dated: April 25, 1978.

Charles J. Flynn
Presiding Justice

APPENDIX C

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

1979 Term
September Session

HILLSBOROUGH, SS.

THE STATE OF NEW HAMPSHIRE

v.

THOMAS H. THEODOSOPOULOS

NO. 78-248

MOTION FOR REHEARING

NOW COMES the defendant and respectfully moves that the Court order a rehearing upon its decision of September 14, 1979, for the following reasons:

1. The Court has erroneously determined that objective probable cause, without a subjective belief by agents of the state that the thing sought was located in the place to be entered and searched, is sufficient to justify a warrantless entry and search.

As was detailed in the defendant's brief on appeal, there was absolutely no testimony whatsoever at the hearing on the defendant's motion to suppress to the effect that the police officers involved actually believed that the object of their sweep search, the "sniper", was located in the defendant's apartment at the time that they broke in. On the contrary, the evidence revealed that the officers waited outside the defendant's apartment for approximately one half (1/2) hour while awaiting the keys. When the keys which did arrive were determined not to fit, the police officers broke into the defendant's apartment.

Sargent Durette, the leader of the search team, testified quite clearly at the hearing as to why the defendant's apartment was entered and searched. He stated that he had made the decision at the very commencement of the sweep search that he would "move down Manchester Street and search everyone of these buildings". (Transcript, p. 32). Sargent Durette testified that it was "our policy and our SOP in building searches" that when a sweep search was conducted, "you didn't leave a building until we searched it thoroughly" (Transcript, p. 49).

This Court states in its opinion, "in the present case, it is not our task to review the propriety of the entire sweep search conducted by members of the Manchester Police Department". (Opinion, p.4). By so stating the issue, the Court erroneously ignores the precedent conduct and decisions of the police which predetermined their entry into the defendant's apartment. The decision by the Court to slice out and review only "the moment the police officers entered the defendant's apartment" (Opinion, p. 4) thereafter leads the Court to its erroneous decision on the question of probable cause.

The Court makes no finding that the police officers subjectively believed that the person for whom they were searching was in the defendant's apartment, nor would the record support such a finding. The Court's holding that the police officers "had reason" to believe that the apartment contained their target is, of course, challenged by the defendant. On the other hand, regardless of the propriety of that conclusion, it is respectfully suggested that a finding of objective probable cause is Constitutionally insufficient to sustain the validity of a warrantless entry and search.

If the purpose of the exclusionary rule is to discipline the police, the Court must be concerned with the intentions and motivations of the police. State v. Spero, 117 N.H. 199 (1977). On the very same day that the present case was decided, the Court issued an admonition in another search and seizure case as follows, "Police are strongly urged not to act without a warrant when they doubt they have a basis to obtain one". State v. Buelu, ___ N.H. ___ (Decided August 17, 1979, distributed September 14, 1979). If the Court expects law officers to heed that advice, its desire will not be accomplished by the ruling in the present case. So long as one may safely run the risk that the hindsight of a reviewing Court may determine that sufficient facts existed to "give reason" for the search, the police will have no real incentive to restrain themselves in cases of doubt.

2. The Court has erroneously justified its conclusion that probable cause existed upon a misstatement of the evidence that "by the time they reached the defendant's apartment, they had searched a significant portion of the buildings that had windows facing the police station".

At the hearing before the Superior Court, the prosecution offered no evidence whatsoever as to the number of buildings or number of apartments located along Manchester Street where the sweep search was conducted. The evidence indicated that the series of apartments in which the defendant's apartment was located was in only the third building searched by Sargent Durette and his team. (Transcript, p. 34 - 37). As was clear from the evidence indicating that certain members of the team wanted to continue down the row of buildings on Manchester Street, the police had not searched the remaining available sites on Manchester Street before they came to the defendant's apartment.

The Court relies in its opinion upon this mistaken conclusion for obvious reasons. Clearly, if the search had narrowed down to the defendant's apartment, those cases which hold that probable cause may be created by excluding alternative locations where the thing sought may be found would be applicable. E.G., United States v. Scott, 520 F. 2d. 697 (CA 9, 1975). On the other hand, where there has been no focusing in upon the particular location, as there was none in this case, such cases are not germane.

The fact of the matter is that there was no evidence that the police had singled out the defendant's apartment at the time that they broke in. Again, as Sargent Durette testified, the reason that the apartment was searched was because, "you didn't leave a building until we searched it thoroughly". (Transcript, p. 49).

3. The Court erroneously failed to rule that the probable cause required for a warrantless search is greater than that required to support a warrant and to apply such ruling to the facts of this case.

The Court in its opinion states that the probable cause required for a warrantless search is "at least as great as that required to support a warrant", but makes no determination as to whether or not it is greater. A number of courts have determined that a warrantless search must be supported by a greater degree of probable cause than a search which is preceded by the neutral and detached review of a magistrate. United States v. Ferrara, 539 F. 2d. 799 (CA 1, 1976); Dorman v. United States, 435 F. 2d 385 (US App. DC, 1970); United States v. Brightwell, 563 F. 2d. 569, 571 (1977) (Dissenting opinion).

It is respectfully suggested that these Courts are correct and that a greater degree of probable cause exists to justify a warrantless search. In light of the defendant's other arguments concerning probable cause, the defendant also obviously suggests that such higher standard was not met in this case.

4. The Court erroneously refused to suppress statements allegedly made by the defendant on the incorrect basis that "no other grounds for suppressing such statements [other than as a result of an illegal search] has been asserted".

The defendant need only point to argument F of its brief to support its contention that "other grounds" were asserted as a basis for suppressing statements allegedly made by the defendant. By both brief and oral argument before this Court, the defendant has repeatedly asserted that the failure of the prosecution to introduce any evidence of such statements constitutes a failure to satisfy its burden of going forward. Likewise, the defendant by both brief and oral argument contended that any such statements were inadmissible because of the testimony by Lieutenant Crotty that the defendant exercised his Constitutional right to silence. (Transcript, p. 86).

On its face, therefore, the statement by the Court that "no other ground for suppressing such statements has been asserted" is palpably untrue. If the Court is intending by its language to suggest that such additional grounds were not raised before the Trial Court, that is likewise untrue. The defendant did file, through counsel, a detailed memorandum with the Trial Court prior to its determination of the case which raised the very same objections asserted in the Supreme Court.

The State did not even respond in its brief on appeal to the defendant's objections to the admission of statements. Indeed, it is the recollection of counsel for the defendant that the State conceded this point to the defendant in oral argument. It therefore, comes as somewhat of a shock to have the Court dismiss the issue with a statement that it had never been raised.

5. The Court erroneously determined that sufficient exigent circumstances existed to authorize a warrantless search.

Again, the Court apparently has held that the test of exigency, as well as probable cause, is objective rather than subjective. This is illustrated by the Court's statement that, "[the police] knew that finding a magistrate and obtaining a warrant in the middle of the night could easily take an hour or two". Although that may well be something that a police officer might assume, there was absolutely no evidence whatsoever in the case at bar that any of the officers made such an assumption. Indeed, the only evidence on the issue at all indicated that a warrant could have been obtained from the magistrate who ultimately issued the post-entry warrant. (Transcript, p. 83, 89 & 90).

To the extent that the Court relies upon such an assumption as stated in its opinion, the Court again ignores the issue of whether or not the police officers subjectively believed an emergency to exist. As detailed in the defendant's brief, the actions of the officers in awaiting the keys to the defendant's apartment clearly established that they had concluded that "exigent circumstances" did not exist.

Respectfully submitted,

THOMAS N. THEODOSOPOULOS

By his attorneys,

WADLEIGH, STARR, PETERS, DUNN & KOHLS

BY: Eugene M. Van Loan

Date: September 24, 1979

I do hereby certify that on the 24th day of September, 1979, a copy of the foregoing Motion was forwarded to Peter W. Heed, Assistant Attorney General, and Peter McDonough, Assistant Hillsborough County Attorney.

Eugene M. Van Loan

Supreme Court, U. S.
FILED
MAR 18 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1558

THOMAS H. THEODOSOPOULOS,
Petitioner,

vs.

STATE OF NEW HAMPSHIRE
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF NEW HAMPSHIRE

RESPONDENT'S BRIEF IN OPPOSITION

The State of New Hampshire

Gregory H. Smith
Acting Attorney General

Peter W. Heed
Assistant Attorney General

State House Annex
Concord, New Hampshire 03301
Counsel for Respondent

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, State of New Hampshire, through its attorneys, the Office of the Attorney General, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Opinion and Order of the Supreme Court of New Hampshire, reported at 409 A.2d. 1134 (August 17, 1979).

OPINIONS BELOW

The Opinion of the Supreme Court of New Hampshire is reported at 409 A.2d. 1134 (August 17, 1979). A copy of this Opinion is also included in the Appendix attached to the Petition for Writ of Certiorari as Appendix A.

It should be noted that the decision of the Supreme Court of New Hampshire was originally rendered on August 17, 1979, but was slightly modified on January 4, 1980, after Petitioner filed a Motion for Rehearing which was denied. See Appendix C. The copy of the Opinion contained in Appendix A reflects both the original text and the slight modifications later made by the Supreme Court of New Hampshire. The Opinion will also eventually be reported in Volume 119 of the New Hampshire Supreme Court Reports.

A copy of the unreported Opinion of the trial court, the Hillsborough County Superior Court, is contained in Appendix B.

JURISDICTION

The Opinion of the Supreme Court of New Hampshire was entered on August 17, 1979. A Motion for Rehearing was denied on January 4, 1980, but the Court slightly modified its original Opinion. The modified Opinion was issued on January 7,

1980, and the Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Should this Court grant the Petition for Writ of Certiorari where the decision below turns exclusively on its particular facts, where there is no conflict in lower court decisions, and where the decision below is correct?

CONSTITUTIONAL PROVISION INVOLVED

At issue in the instant case is the Fourth Amendment to the Constitution of the United States, as made applicable to the States by the Fourteenth Amendment.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

No State statutes are involved in the case at bar.

STATEMENT OF THE CASE

While it is Respondent's intention to keep the Brief in Opposition as short as possible, a detailed statement of the facts is necessary for two reasons. First, the decision of this Court turns on the particular facts of the case. Second, Respondent is not satisfied with the presentation of the facts made by Petitioner.

The appeal to the Supreme Court of New Hampshire arose from the trial court's denial of Petitioner's motion to suppress all evidence obtained as a direct and indirect result of a search made of his apartment by members of the Manchester, New Hampshire Police Department. All questions of law were transferred to the Supreme Court of New Hampshire through an interlocutory appeal. Petitioner has yet to stand trial. The relevant facts, as revealed in the transcript of the hearing on the suppression motion, are as follows.

The Manchester Police Station was more busy than usual during the early morning hours of December 31, 1977. Captain Evangelos Xiggoros was the officer in charge of the desk when Mrs. Dorothy Perreault was brought into the station. Earlier in the evening she complained that her son, Bruce, had pointed

a gun at her; she was brought to the station for her own safety.

In the lobby of the station, Captain Xiggoros and an Officer Tocci spoke to Mrs. Perrault, trying to determine where her son might be found. The time was approximately 12:55 a.m. on December 31, 1977.

A gunshot pierced the relative quiet of the police station. Captain Xiggoros and Mrs. Perreault fell, each seriously wounded.

What appeared to be smoke was observed near the stairs in the front portion of the lobby. Captain Xiggoros, who was still conscious and apparently assuming that Bruce Perreault had done the shooting, said, "Get that little so and so. He just shot me."

The next twenty minutes were marked by a high degree of confusion. Initially operating under the assumption that the assailant had fired from within the building, police were deployed around the outside of the station to prevent an escape. The building's interior lights were almost immediately turned off, and a search was begun of the inside of the station.

While this was happening, mobile units were called to the station area to block off the surrounding streets. Off-duty personnel were called in, while the

on-duty officers tried to organize as quickly as possible to effectuate the search of the station and remove the wounded. Deputy Chief Edmund LeBoeuf accurately described the scene when he arrived at approximately 1:20 a.m.

> "Everybody was in a situation where they didn't know what was happening. They knew a shot was fired and a couple people had been hit. They had the blocked area at that point surrounded and expected almost anything."

When the Deputy Chief arrived, he observed numerous police cruisers which had cordoned off the station. Police officers were in "crouched" positions, and they waved at the Deputy Chief, trying to warn him not to get out of his car. He was eventually able to procede along the darkened facade of the building and enter through the front door.

Other returning officers were met with similar receptions. Detective/Lieutenant John Crotty was approached by a policeman with his gun drawn. The officer told Crotty to "watch it" and not to proceed into the building until he was "sure it was safe." When Sergeant Louis Durette arrived at about 1:20 a.m., he

saw policemen hiding behind cement walls and in doorways. An officer hollered to Durette, "Sarge, keep down. We don't know where the sniper is." Thus, Sergeant Durette knew he might be facing a sniper situation even before he entered the station.

By the time LeBoeuf and Durette arrived, at about 1:20 a.m., it had been determined that the assailant was not in the station. The injured Captain Xiggoros and Mrs. Perreault were removed to the hospital by ambulance, and a city-wide search for Bruce Perreault got underway.

Sergeant Durette immediately began to organize and equip the Manchester Police Department Special Reaction Team. Durette testified that the Special Reaction Team [SRT] is a team of men "especially trained to respond to hostage, sniper, or other situations . . . ." They are equipped with automatic weapons, bullet-proof vests, shotguns, gas masks, and ropes to climb buildings.

While Durette was being briefed by Captain Murphy on the current status of the emergency, and his SRT team was preparing to move out, Durette noticed what appeared to be a bullet hole in the upper part of one of the large panels of glass which form the westerly wall of the police station lobby. Deputy Chief LeBoeuf also noticed the hole. The glass pane was shattered, and the hole itself

was about five or six inches in diameter. The hole was approximately ten or eleven feet above the lobby floor.

With this new information, Durette took his SRT group, consisting of eighteen men, directly across Chestnut Street to search the large church situated opposite the glass wall of the police station lobby. It was now between 1:45 a.m. and 1:50 a.m. The lights were still off in the station, but the focus of police attention became the city block west of the station -- the block which was separated from the station by Chestnut Street, bordered on the north by Manchester Street, and bordered on the south by Merrimack Street.

The search of the church revealed nothing, so Durette positioned his men outside while he went back to the station to reconsider the situation. LeBoeuf, Murphy, Durette and others then scrutinized the evidence in the lobby. By lining up the bullet hole in the window with the spots where Xiggoros and Mrs. Perreault had been standing, the men attempted to determine the approximate trajectory of the bullet, and thus discern the point of origin of the shot. The positions of Xiggoros and Perreault were determined from blood stains on the floor and a bullet hole in the wall.

While this reckoning was hampered slightly by the position of the police

department Christmas tree, the officers were able to conclude that the shot probably had been fired from the rear of some multi-story apartment building which faced Manchester Street. Durette took his SRT team and began an immediate search of those buildings.

The SRT squad was broken into two groups: one group covered the alleyways and rooftops; the other group searched the interior of the buildings. The search began with a grinder shop on the corner of Chestnut and Manchester Streets and gradually moved westward along Manchester Street. The search of these buildings began between 2:00 a.m. and 2:05 a.m.

The search proceeded through several stores with negative results, and eventually arrived at a four story apartment building, bearing an address of 83 Manchester Street. The time now was 2:15 a.m.

Durette took eight SRT members inside, while the remaining ten searched the back alleys and rooftop areas. The ground floor was clear; Durette left a man to guard and then moved on to the second floor. On this floor, the SRT men aroused one Mrs. Irene Berlinquette from her sleep, and told her there had been a shooting. They asked to search her apartment, and she consented. The search proved negative.

Durette and his men moved to the

third floor, where they pounded on the door and received no answer. There were three doors to the apartment; Durette could see light coming from the crack in one of the doors. However, no noise whatsoever was heard from within.

Durette went back to Mrs. Berlinquette, who told Durette that the Petitioner, Thomas Theodosopoulos, lived in the apartment and that if his four-wheel drive truck was parked outside, "he must be home." Mrs. Berlinquette testified that she never told the police anything about Petitioner's truck, but did recall telling them that she had heard no sounds from upstairs.

In all events, Sergeant Durette kept pounding on the door, again with no response. During this time, he sent members of the SRT to search the fourth floor and roof. They found nothing. It was determined, however, that Petitioner's truck was parked outside.

Durette then contacted Captain Murphy at the police station, and requested that the keys to the room be relayed from the landlord by police cruiser. At this point, Sergeant Tanguay, leader of one of the SRT squads, asked if his men could move on to do an interior search of the next building. Durette told them that it was SRT policy that one building had to be completely searched before another building search could be initiated.

When the keys arrived, they would not work. Durette summarized his feelings at this point:

> "I felt that the whole situation was very grave. I thought other people's lives were in danger, my life and everyone else's . . . . And that is the purpose I was there, to locate the person who did the shooting, so that no one else would get hurt." (emphasis supplied)

Having exhausted all other efforts to gain entry, Durette kicked open the weakest of the three doors, and headed toward the light in the apartment. The time of the entry was about 3:00 a.m. -- only two hours after the actual shooting. Durette and his men had been on the third floor for a total time of thirty minutes.

The police moved swiftly through a living room, where they observed nobody, down a short hallway and into the kitchen. In a room adjacent to the living room, marijuana was discovered. There was a bedroom to the right of the kitchen, and a bathroom to the left. All three of these rooms were on the alley side of the apartment, facing the police station. The Petitioner was found nude on a bed in the bedroom, but police were not able to arouse him. It was impossible to

determine if he was asleep, intoxicated, or feigning drowsiness. On a bureau in plain view were observed empty .350 caliber shell casings and a rifle scope. Another empty caliber casing was found on the floor of a side room.

Two men were left to guard the Petitioner, while the rest of the police continued to look for the presence of another person in the apartment. Durette testified that his men feared that somebody might spring out of a closet.

In the bathroom, the police observed a broken window. From this window, one could see (or shoot at) the glassed-in westerly wall of the police station.

Finally, a padlocked closet was discovered, but Deputy Chief LeBoeuf, who had just arrived on the scene, told the men, "Just leave it alone." It was not searched.

The Petitioner was eventually gotten to his feet, dressed, and taken to the police station along with the articles of evidence found at the scene.

Later in the morning, at about 6:00 a.m., a search warrant was obtained from Judge Capistran of the Manchester District Court for a search of Petitioner's car and locked closet. The warrant was issued on the basis of an affidavit by Lieutenant Crotty which included, inter alia, details

from Sergeant Durette, the observation of the shell casings, the broken bathroom window, and the trajectory of the path from the bathroom window to the police station. The search of Petitioner's locked closet uncovered a pellet rifle, a 16 gauge shotgun, and a .350 caliber rifle.

Petitioner was indicted by the Hillsborough County Grand Jury during the January term of 1978 for two counts of attempted manslaughter. On February 17, 1978, Defendant filed a pre-trial motion to suppress all physical evidence taken from his apartment and/or motor vehicle and to suppress all statements made by him during and subsequent to the entry of his apartment by members of the Manchester Police Department. A hearing was held on Defendant's suppression motion on April 6, 1978, before the Hillsborough County Superior Court, Flynn, P. J.

After considering all the evidence, the Court denied Petitioner's motion to suppress. The Court issued a lengthy opinion on April 25, 1978, detailing the reasons for the denial. See Appendix B.

On May 2, 1978, the Defendant filed a motion for an interlocutory appeal, which was granted by the Supreme Court of New Hampshire. Its Opinion, as modified, was issued on January 7, 1980, and is reported at 119 N.H. ____, 408 A.2d. 1134. See Appendix A.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW TURNS EXCLUSIVELY ON AN ANALYSIS OF THE FACTS, AND THE OUTCOME WILL NOT HAVE BROAD EFFECT ON OTHER CASES.

Because the search of Petitioner's apartment in the instant case was conducted without obtaining a judicially issued search warrant, the New Hampshire Supreme Court was called upon to decide whether the required probable cause plus exigent circumstances existed. See, Warden vs. Hayden, 387 U.S. 294 (1967). This determination calls for a detailed analysis of the particular facts of any case. Both the trial court and the Supreme Court of New Hampshire conducted a comprehensive and complete examination of the totality of the circumstances in the case at bar, and both courts determined that probable cause and exigent circumstances existed which justified the warrantless search. See, Opinion of Trial Court, Appendix B; and State vs. Theodosopoulos, 409 A.2d. 1134 (1979).

In the Petition for Writ of Certiorari, Petitioner's major argument amounts to little more than that the analysis of the facts by both State Courts was erroneous. No substantial issue of law is raised; the only real issue is a factual one. This is not the stuff out of which an appeal to the highest Court in the

land is made. This Court is and should be reluctant to review a case which turns exclusively on its own facts and involves no substantial issue of law. The instant case is such a case. For this reason alone it does not merit review.

Moreover, because the instant case involves a particular type of exigent circumstance, its application to other situations is extremely limited. That is, the exigent circumstance present here involves the so-called "emergency doctrine," for there existed a compelling need for immediate official action and a risk that the delay inherent in obtaining a warrant would present a substantial threat of imminent danger to life or public safety. See, Mincey vs. Arizona, 437 U.S. 385 (1978). The particular emergency present in the case at bar was the presence of a sniper -- a sniper who had already shot and wounded two people. This one particular fact -- the existence of a sniper who had already shown a propensity to kill -- necessarily pervades the entire case. It is the key fact justifying the emergency. And it is the fact that distinguishes it from all other situations involving exigent circumstances. The holding in the instant case is thus limited to similar sniper situations, a particularly narrow area. See, State vs. Max, 263 N.W.2d. 685 (S.D. 1978). In sum, because the decision below turns exclusively on an analysis of the underlying facts, and because that decision will not have

broad effect on other cases, it does not merit review by this Court.

II. THERE IS NO CONFLICT AMONG LOWER COURTS WHICH HAVE CONSIDERED THE EMERGENCY DOCTRINE IN CONNECTION WITH FACTUAL SITUATIONS SUBSTANTIALLY SIMILAR TO THE INSTANT CASE.

Nowhere in the Petition for Writ of Certiorari does Petitioner claim that there is any substantive conflict among lower courts which have applied the emergency doctrine. Petitioner cannot make the claim, because there is no conflict.

The emergency doctrine has been explicitly recognized by this Court and applied by lower federal and state courts in a variety of situations. See, e.g., Mincey vs. Arizona, supra; Warden vs. Hayden, supra; Wayne vs. United States, 318 F.2d. 212 (D.C. Cir.), cert. denied 375 U.S. 860 (1963); United States vs. Barone, 330 F.2d. 543 (2nd Cir.), cert. denied 377 U.S. 1004 (1964); United States vs. Goldenstein, 456 F.2d. 1006 (8th Cir. 1972); State vs. Cook, 547 P.2d. 50 (Ariz. 1976); Patrick vs. State, 227 A.2d. 486 (Del. 1967); State vs. Huff, 551 P.2d. 880 (Kan. 1976); State vs. Hardin, 518 P.2d. 151 (Nev. 1974); and People vs. Mitchell, 347 N.E.2d. 607 (N.Y. 1976). Several courts have considered and approved emergency searches in circum-

stances strikingly similar to the instant case. See, State vs. Hardin, supra (recent homicide, murderer at large); People vs. Mitchell, supra (recent homicide, murderer at large); and State vs. Max, supra (sniper at large).

There is no substantial conflict among these decisions, either as to the legal standards involved when the emergency doctrine is utilized or as to the manner in which those standards are to be applied to a given set of facts. The holding of the Supreme Court of New Hampshire is consistent with the above cited decisions. It breaks no new ground, but merely travels an already well blazed path. In these circumstances, review by this Court is unnecessary and inappropriate.

III. THE DECISION OF THE SUPREME COURT OF NEW HAMPSHIRE IS MANIFESTLY CORRECT.

In his lengthy Petition for Writ of Certiorari, Petitioner essentially argues the merits of his case. Distilled to its essence, Petitioner's claim is that both the trial court and the Supreme Court of New Hampshire misapplied the facts to the law when they decided that the warrantless search in question was justified by the existence of probable cause plus exigent circumstances. While now avoiding the temptation to herein answer all of

Petitioner's arguments on the merits, the Respondent respectfully submits that it is clear on the face of the decision that the Supreme Court of New Hampshire did not err. State vs. Theodosopoulos, supra.

Accepting the recognized standard that the probable cause required for a warrantless search under exigent circumstances is at least as great as that required to support a warrant, the Supreme Court of New Hampshire correctly held that probable cause did indeed exist to believe the sniper was in Petitioner's apartment. See, Recznick vs. City of Lorain, 393 U.S. 166 (1968). The record demonstrates that the officers had calculated the bullet trajectory sufficiently to focus their search on a particular row of buildings along Manchester Street. By the time they reached the Petitioner's apartment, they had searched a significant number of these buildings and had secured those buildings which were closer to the police station than the Petitioner's. The Petitioner's apartment was on the third floor, at a height compatible with the bullet path. Lights were on in the apartment and Petitioner's truck was parked outside, leading the officers to believe that the apartment was occupied. When no one responded to their persistent knocking, they had reason to conclude that the occupant wished to conceal his presence. Considering all these circumstances, the New Hampshire Supreme Court did not err in holding that probable cause had been established.

Neither did the Court err in ruling that exigent circumstances existed pursuant to the emergency doctrine. The police were confronted with a totally unforeseeable shooting, perpetrated by an unknown sniper in the dead of night, with the sniper fire piercing the very heart of the police station. Two human beings lay seriously wounded. It strains one's imagination to conjure up an emergency situation of a more compelling nature.

The fact that the police did not break into Petitioner's apartment immediately does not vitiate the emergency. It took Sergeant Durette some time to establish that a person lived in the apartment and was probably home. It took additional time to search the alley, third floor, and roof of the building. Even then, Sergeant Durette in good faith sought the least violent method of entry -- keys. When that did not work, Sergeant Durette was faced with an incredibly difficult decision. If he waited for a search warrant to be secured, he ran the dual risk that the sniper might open fire on a new target, or that he might escape if he were in the other unsearched buildings. If he left one or two men to guard the apartment while taking the rest to continue the search, he still ran the risk that the sniper might open fire, and he ran the additional risk that he might try to escape from Petitioner's apartment with the guard diminished. If he did not wait for a warrant, he could search and secure Petitioner's apartment and immediately continue with the search if the

sniper was not there.

In the end, Sergeant Durette made the only rational choice he could where protection of life was paramount -- he went in.

> "I felt that the whole situation was very grave. I thought other people's lives were in danger, my life and everyone else's . . . . And that is the purpose I was there, to locate the person who did the shooting, so that no one else would get hurt."

Considering all the circumstances, the Supreme Court of New Hampshire fully considered and correctly decided the issue of whether or not the emergency was of such a nature to amount to exigent circumstances. Mincey vs. Arizona, supra; People vs. Mitchell, supra; and State vs. Max, supra. See, Williamson, The Supreme Court, Warrantless Searches, and Exigent Circumstances, 31 Okla. L. Rev. 110 (1978). That correct decision does not warrant review by this Court.

CONCLUSION

For all the reasons stated above, the Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

The State of New Hampshire

Gregory H. Smith
Acting Attorney General

Peter W. Heed
Assistant Attorney General

State House Annex
Concord, New Hampshire 03301
Telephone: (603) 271-3671
Counsel for Respondent